No. 9474

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit /0

SOUTHERN PACIFIC COMPANY
(a corporation),
Appellant,

vs.

JOE CONWAY,
Appellee.

APPELLANT'S OPENING BRIEF.

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I. JURISDICTIONAL STATEMENT.

This suit was originally brought in the District Court for Arizona, by the filing on April 18, 1939, of a complaint in which plaintiff (appellant)* sought a declaratory judgment as follows: (a) that the Arizona Train-Limit Law (*Arizona Revised Code,* 1928, Section 647) is unconstitutional and void, because in conflict with the Commerce Clause (Art. I, Sec. 8, par. 3) of, and the due-process clause of the Fourteenth Amendment to, the Constitution of the United States; and (b) that the defendant (appellee) who, though sued as an individual, is presently Attorney General of Arizona, has no power or duty to enforce

*The parties are designated in the same manner as in the trial court: i.e., appellant as "plaintiff", appellee as "defendant".

said Train-Limit Law, or to prosecute plaintiff for penalties for its violation.

The District Court had jurisdiction of the parties and the subject matter, under paragraphs 1 and 14 of Section 41, and Section 400, of Title 28 of the United States Code, because: (a) the suit is between citizens of different states, plaintiff being a corporation organized under laws of Kentucky, and a resident of that state, while defendant is a citizen and resident of Arizona (Complaint, par. I; R. 2-3); (b) the value of the matter in controversy, if a controversy exists, greatly exceeds $3000 (Complaint, par. II-b; R. 4); (c) the suit essentially involves the determination of questions arising under the Constitution and laws of the United States (Complaint, par. II-c; R. 4-5); (d) an actual controversy exists, which may be finally determined by a declaratory judgment as prayed for (Complaint, pars. II-c, II-e, XV; R. 4-6, 38-40).

Jurisdiction to render a declaratory judgment is conferred by the Federal Declaratory Judgments Act of 1934, 28 U. S. Code 400 (quoted in the Appendix); and by its complaint (pars. II-a, II-b, Prayer; R. 2-4, 43-44) plaintiff specifically invoked the exercise of that power by the trial court.

Diversity of citizenship, value of the amount in controversy if a controversy exists, and existence of Federal questions, were all admitted, either expressly or by reasonable inference (R. 75-76, 82).

Jurisdiction is conferred upon this Court to entertain and decide the case upon this appeal, by Section 225, Title 28, U. S. Code (the case not falling within

Section 345 of the same Title), in that the District Court rendered its final decree and judgment herein, dated February 14, 1940 (R. 115), dismissing the case for lack of jurisdiction, upon the sole ground that no justiciable case or controversy is presented. The findings of fact and conclusions of law adopted by the trial court (R. 109-114) show that that Court, although of the view that defendant, sued in his individual capacity, was a proper party to this action, and that other necessary jurisdictional facts had been established, reached the conclusion upon the evidence, particularly the admissions of defendant, that the parties were not in controversy as to the constitutionality of the Train-Limit Law, or defendant's duties thereunder.

Notice of appeal from the trial court's judgment was duly filed by the plaintiff within three months from the date of the rendition of the judgment; i. e., on February 15, 1940 (R. 116). A motion to amend the trial court's findings and conclusions having been presented by defendant on February 16, 1940 (R. 118-119), which motion the court denied on February 26, 1940 (R. 119-120), plaintiff again filed its notice of appeal on March 2, 1940 (R. 120).

II. STATEMENT OF THE CASE.

This suit was brought, as heretofore stated, for the purpose of obtaining a judgment declaring that the Arizona Train-Limit Law is invalid and unconstitutional. That statute (quoted in full in the complaint:

par. IV; R. 8-9; and also set out in full in the Appendix hereto) declares it to be unlawful for any railroad company to operate, within the State of Arizona, passenger trains of more than 14 cars, or any trains of more than 70 freight or other cars, exclusive of caboose. Severe and cumulative penalties are imposed, which may range from $100.00 to $1000.00 for each violation. By the express terms of the law the Attorney General is solely charged with the power and duty of conducting or supervising prosecutions for the recovery of such penalties.

The complaint, besides containing the necessary jurisdictional allegations reviewed in the foregoing statement, also alleges, in separate paragraphs, certain essential facts which may be summarized as follows: the detailed facts with respect to plaintiff's interstate railroad operations, as a common carrier both upon its system, and in Arizona (par. III; R. 6-8); the effects of the law upon plaintiff's operations, both generally, and particularly as regards freight-train operations (par. V; R. 9-21); the similar effects upon passenger-train operations (par. VI; R. 21-24); the effect of the law from the safety standpoint, with particular reference to the point that the law is wholly unreasonable as a safety measure, bears no reasonable relation to health and safety, and operates to increase rather than to reduce the hazards of railroad operations (par. VII; R. 25-30); and the essentially interstate, rather than intrastate or local, character of the plaintiff's operations and traffic within and across Arizona which are affected by the law (par. VIII; R. 30-32).

The complaint also alleges that the subject of train limitation is one of national, and not local or state concern (par. IX; R. 32-33); that the law impairs the usefulness of the plaintiff's facilities employed in interstate commerce (par. X; R. 33), and imposes burdens on interstate commerce (par. XI; R. 33); and that it is invalid and unconstitutional, because in violation of the commerce clause (par. XII; R. 34), and the due-process clause of the Fourteenth Amendment (par. XIII; R. 35), and (in so far as it purports or is asserted to be a safety statute) in conflict with, and an infringement on, certain specified federal statutes having to do with the safety of railroad operation (par. XIV; R. 36-38). The complaint further alleges that if it were not for the law, plaintiff could realize numerous benefits, particularly increased efficiency, economy, and safety, in its Arizona operations, by operating trains in excess of the maximum lengths permitted by the law (par. XV; R. 38-40); that because of compliance with the law, plaintiff incurs added and irreparable expense, of at least $300,000.00 per year, which could and would be saved by "long-train" operation, but that the heavy penalties, ranging from $1600.00 per day, at the minimum of $100.00 per violation, during the period of lightest traffic, to $37,000.00 per day, at the maximum of $1000.00 per violation, during the period of heaviest traffic, are such as to prevent plaintiff from undertaking such operations (par. XVI; R. 40-42).

It is also alleged that plaintiff is without adequate remedy at law (par. XVII; R. 42). Each and all of these allegations were, as hereinafter shown, ad-

mitted and conceded by the defendant to be true, and were therefore found by the trial court to be true (Findings of Fact Nos. V, VI, VII; R. 111-114).

An actual controversy was alleged to arise, because of defendant's asserted claims that the law was constitutional and valid, and that the power and duty of enforcement existed and were vested in him (Complaint, par. XV; R. 38-40).

Defendant filed his answer in due course, denying specifically those allegations of the complaint setting forth the existence of jurisdiction, and particularly those stating that a controversy was presented. As to the remainder of the complaint, he adopted in his answer a peculiar and rather equivocal position. The Court's particular attention is invited to paragraph XII of the answer (R. 58-59) which, though addressed only to paragraph V of the complaint, is typical of and exactly similar to several others, each directed to various paragraphs of the complaint.

On November 3, 1939, the parties were called before the trial court for pre-trial conference, as provided by Rule 16 of the Federal Rules of Civil Procedure. At that conference, in response to questions from the court, defendant's counsel announced that defendant admitted each and all of the following paragraphs of the complaint: Nos. I-a, I-b, II-b, III to XIV, inclusive, *XVI* and XVII. Counsel for defendant somewhat qualified his admission of paragraph I-b, however, in that he conceded that the Constitution and statutes of Arizona impose upon him power and duty

to enforce the Train-Limit Law, "in the case of a constitutional law" (R. 75-76).

Defendant, through his counsel, at the same time stated that he denied those portions of the complaint (pars. II-a, II-b, II-c, II-e, and a portion of par. XV) which alleged the existence of an actual controversy of which the trial court had jurisdiction; although he admitted that the value of the matter in controversy, if a controversy exists, exceeds $3000 (R. 82).

On December 1, 1939, the court made its pre-trial order (R. 92-93); which order, except for failure to show defendant's admission of paragraph II-d of the complaint, correctly reflected the proceedings upon the pre-trial conference.

The case came on for trial before the Court, on December 12, 1939. Defendant then presented to the Court his written motion (R. 93-95) to amend the order on pre-trial conference, so as to show (a) that he had denied that part of paragraph I-b of the complaint (R. 3), which alleged that the Constitution and laws of Arizona vested him with power to enforce the Train-Limit Law, and (b) that he had also denied that part of paragraph XVI (R. 41) which alleged that he claimed that it was his duty to enforce the law. Over plaintiff's objection, the trial court (R. 96, 127) permitted the proposed amendment. The first specification of error is addressed to the action thus taken.

The trial then proceeded, plaintiff introducing in evidence: (1) an affidavit filed by defendant on May

5, 1939 (R. 47-49), in support of the motion to dismiss the complaint filed on the same day (said motion was denied on June 24, 1939: R. 52); (2) the notice of the taking of defendant's deposition; and (3) the deposition in its entirety. The substance of defendant's deposition is reproduced in the record, partially in narrative, and partially in question-and-answer form (R. 130-143). Because defendant had admitted each and all of the substantive allegations of the complaint, other than those asserting the existence of an actual controversy, and the Court had announced that evidence in support of such allegations would not be required (R. 93), plaintiff introduced no evidence in support of said allegations; and defendant introduced no evidence at all. Defendant renewed his earlier motion to dismiss for lack of controversy (R. 143-144); and the cause was submitted for decision solely upon that issue (R. 144).

The case was brought to this Court, upon plaintiff's appeal (R. 120) from the judgment, dated February 14, 1940 (R. 115), dismissing the case for lack of jurisdiction. That judgment and order were, as shown by the trial court's findings of fact and conclusions of law (R. 109-114) and, indeed, the very language of the judgment itself (R. 115), predicated entirely upon that court's conclusion that, since the parties had agreed and in effect stipulated upon all of the factual matters establishing that the challenged statute is invalid, and defendant had made no threat and taken no action to enforce the law, no case or controversy is presented within the judicial power of the United States courts.

On May 8, 1940, while this appeal was pending, and shortly prior to the date upon which plaintiff's opening brief was to have been filed, plaintiff presented to this Court its motion that the cause be remanded to the trial court, so as to permit a supplemental complaint to be filed, and evidence presented in support thereof. In connection with its said motion plaintiff showed to this Court that defendant, acting or purporting to act as Attorney General, had on April 19, 1940, brought suit in the Superior Court of the State of Arizona, in the name of the State, against plaintiff as the defendant, accusing plaintiff of having committed two violations of the Train-Limit Law, and seeking to recover the statutory penalties; and also that defendant had on the same day issued a public statement, announcing his belief in the validity of the law and his intention, if successful in the prosecution thus commenced, to sue this plaintiff for penalties with respect to each and every other violation which it might have committed, and specifying that such penalties might aggregate $100,000.00 or more.

On or about May 25, 1940, defendant filed his written reply and "opposition" to plaintiff's said motion, in effect admitting and agreeing that defendant had instituted prosecutions in the state courts as above stated. The fact of such prosecutions, and thus, by necessary inference, of defendant's belief and contention that the power and duty of prosecution exist and are vested in himself, is thus before this Court, as a part of this Court's record in this cause.

Plaintiff's motion to remand was duly argued and submitted to this Court on June 3, 1940; and on June 19, 1940, the Court entered its order denying said motion, "without prejudice to the right to renew such motion at the time the appeal is heard on the merits". In response to that suggestion, plaintiff now renews said motion, urging that the same be further considered, and granted in the event that this Court is not convinced, upon the record before it, that the judgment of the trial court was erroneous and should be reversed.

III. SPECIFICATION OF ERRORS.

1. The trial court erred in amending the order on pre-trial conference, and in failing to be guided by the pre-trial record as made.

2. The trial court erred in failing to find and conclude, upon the undisputed record: that defendant admits and agrees that it now is, and in future will be, his official duty to prosecute each and every violation of the Arizona Train-Limit Law which may occur; and that defendant has declared that he never has stated and never will state, having in mind the official oath of his office as Attorney General, that he will refuse to enforce, or refrain from efforts to enforce said law.

3. The trial court erred in failing to find and conclude that, irrespective of defendant's individual beliefs or admissions as to the validity of said Train-Limit Law, it is his official duty as Attorney General

to enforce said law according to its terms, until and unless the invalidity thereof be finally determined by a competent tribunal; and that said defendant has never disavowed said duty, or declared that he would fail or refuse to perform the same.

4. The trial court erred in finding and concluding that defendant has not threatened to enforce said Train-Limit Law, nor taken any action toward enforcing said law.

5. The trial court erred in concluding that no actual case or controversy, within the judicial power of the United States courts, is presented in this cause.

6. The trial court erred in failing to find and conclude that this action for a declaratory judgment is properly and lawfully maintainable against defendant; and that said defendant, as an individual, is a proper and necessary party to said action.

7. The trial court erred (a) in rendering and entering its judgment of February 14, 1940, in favor of defendant, dismissing plaintiff's complaint and action; and (b) in failing to render and enter its declaratory judgment and decree, in favor of plaintiff, adjudging and declaring that no power or duty to enforce said Train-Limit Law, or to conduct or direct prosecutions thereunder in the event of violation by plaintiff, is lawfully vested in or imposed upon defendant, either as Attorney General of Arizona, or otherwise.

IV. BRIEF OF ARGUMENT.

1. **The record shows that the parties advance and maintain opposing claims as to the powers and duties of defendant with respect to the enforcement of the Arizona Train-Limit Law.**

Defendant has admitted his official duty to prosecute for violations of the Train-Limit Law, and declares that he has never said, and never will say, that he will refrain from or refuse performance of that duty (R. 75-76, 90, 132, 138, 140-141). Plaintiff's claim, as to which there is no question, is that such power and duty of enforcement do not exist.

In the absence of a judicial determination, the duty of enforcement created by the law persists, and should be exercised by defendant as Attorney General, even though as an individual he may consider the law unconstitutional. The law is presumed valid, until its invalidity is judicially determined.

Pennsylvania v. West Virginia (1923), 262 U. S. 553 (592), 67 L. Ed. 1117;

South Carolina v. Barnwell (1938), 303 U. S. 177 (191), 82 L. Ed. 734;

Great Northern Ry. Co. v. Washington (1937), 300 U. S. 154 (160), 81 L. Ed. 573;

Alaska Packers Assn. v. Industrial Accident Commission (1935), 294 U. S. 532, 79 L. Ed. 1044;

Concordia Insurance Co. v. Illinois (1934), 292 U. S. 535 (547), 78 L. Ed. 1411;

A. T. & S. F. Ry. Co. v. State (1928), 33 Ariz. 440, 265 Pac. 602;

Arizona Bank v. Crystal Ice, etc., Co. (1924), 26 Ariz. 205, 224 Pac. 622;

Black & White Co. v. Standard Oil Co. (1923), 25 Ariz. 381, 218 Pac. 139;

Smith v. Mahoney (1921), 22 Ariz. 342, 197 Pac. 704;

Timmons v. Wright (1921), 22 Ariz. 135, 195 Pac. 100;

State v. Anklan (1934), 43 Ariz. 362, 31 P. (2d) 888.

Defendant's opinion of the law's validity, even though rendered in his "official" capacity, is merely advisory, and not a judicial determination.

Austin v. Barrett (1932), 41 Ariz. 138, 16 P. (2d) 12;

Hartford, etc. Co. v. Wainscott (1933), 41 Ariz. 439, 19 P. (2d) 328 (331);

Canadian Northern Ry. Co. v. Eggen (1920), 252 U. S. 553 (562), 64 L. Ed. 713;

United States v. Butler (1936), 297 U. S. 1 (62), 80 L. Ed. 477;

16 *Corpus Juris Sec.* 201-204.

Defendant has never availed himself of the opportunity of avoiding official duty, apparently afforded by the ruling in:

Ex parte LaPrade (1933), 289 U. S. 444, 77 L. Ed. 1311;

indeed, he has consistently and pointedly refused to do so (R. 138-141).

The record of the pre-trial proceedings shows that defendant maintains that the right and duty of prosecution exist (R. 75-76, 90).

The original pre-trial order (R. 92-93) correctly recites the pre-trial proceedings. It was erroneously "corrected" on defendant's motion (R. 93, 95), though without any showing that the pre-trial record was incorrect or any effort to have that record changed. The order as originally made, being accurate, should control, there being no showing that a change thereof was warranted, or necessary to prevent manifest injustice.

Rule 16, Federal Rules of Civil Procedure;
Byers v. Clark (1939), 27 Fed. Supp. 302;
Miles Laboratories v. Seignious (1939), 30 Fed. Supp. 549;
Fancuillo v. B. G. & S. Theatre Corp. (Mass., 1937), 8 N. E. (2d) 174;
Eckstein v. Scoffi (Mass., 1938), 13 N. E. (2d) 436;
Finegan v. Prudential Ins. Co. (Mass., 1938), 14 N. E. (2d) 172.

In fact the original pre-trial order, if allowed to stand, would not have imposed any injustice upon defendant; whereas the modification resulted in substantial prejudice and manifest injustice to plaintiff.

2. The existence of conflicting claims, duly maintained and advanced by parties properly having an interest in the subject matter, is sufficient to constitute a case or controversy warranting the exercise of the powers conferred by the Declaratory Judgments Act, 28 U. S. 400.

The essentials of a "case or controversy" in a declaratory-judgment proceeding are precisely the same as in any other type of case: namely, that there be parties having definite legal interests touching the

subject matter; that they maintain definite adverse claims with relation thereto; and that the circumstances be such that specific relief can be had, through a decree of conclusive character which will dispose of the dispute. Threats of irreparable injury by one party against the other are not essential, if otherwise the parties are definitely opposed.

Aetna Life Ins. Co. v. Haworth (1937), 300 U. S. 227, 81 L. Ed. 617;

Nashville C. & St. L. Ry. Co. v. Wallace (1933), 288 U. S. 249, 77 L. Ed. 730.

The parties here are definitely in opposition to each other, with respect to a subject matter in which both have a legal interest; i. e., the question whether the power and duty of prosecution under the Train-Limit Law legally exist and may be exercised by defendant.

A suit for a declaratory judgment is proper, even though only negative relief is sought: i. e., a declaration that a duty or liability under a statute or patent do not exist, because of invalidity thereof.

Gully v. Interstate Natural Gas Co. (1936), 82 F. (2d) 145;

Edelmann v. Triple-A Specialty Co. (1937), 88 F. (2d) 852, 854;

Bliss v. Cold Metal Process Co. (1939), 102 F. (2d) 105;

Black v. Little, 8 F. Supp. 867;

Maryland Casualty Co. v. Hubbard, 22 F. Supp. 697.

In a recent case this Court affirmed a declaratory judgment of non-liability (i. e., non-infringement of

a patent), finding that an actual controversy existed, even though the defendant by its answer as finally amended had admitted substantially all of the allegations of the complaint.

Caterpillar Tractor Co. v. International Harvester Co. (1939), 106 F. (2d) 769.

A controversy may arise, between a private individual, and a public officer, even though the latter refuses to take any positive action, and adopts a purely negative attitude, if the effect is to perpetuate a restraint or disability challenged as unlawful.

Rochester Telephone Corporation v. United States (1939), 307 U. S. 125, 83 L. Ed. 1147;

Perkins v. Elg (1939), 307 U. S. 325, 83 L. Ed. 1320.

3. **Although defendant is sued herein in his individual capacity and not "as Attorney General", he has an actual interest in the subject matter, and is a proper and necessary party to the present controversy.**

Defendant's power, by virtue of his office and the state statute, sufficiently connects him with the duty of enforcement of the challenged law to render him a proper party, in his individual capacity, to a suit brought to restrain enforcement.

Ex Parte Young (1908), 209 U. S. 123, 52 L. Ed. 714;

Truax v. Raich (1915), 239 U. S. 33, 60 L. Ed. 131;

Terrace v. Thompson (1923), 263 U. S. 197, 68 L. Ed. 255;

Pierce v. Society of Sisters (1925), 268 U. S. 510, 69 L. Ed. 1070;

Old Colony Trust Co. v. Seattle (1926), 271 U. S. 426, 70 L. Ed. 1019;

Missouri Pacific R. Co. v. Norwood (1930), 42 F. (2d) 765;

Municipal Gas Co. v. Public Service Commission (1919), 225 N. Y. 89, 121 N. E. 772.

The requirements of actual controversy are the same, in a suit for a declaratory judgment attacking a state law, as in a suit to enjoin or restrain enforcement; hence defendant is equally a proper party, as an individual, to a declaratory-judgment suit in which a determination is sought that the power and duty of enforcement do not exist.

Municipal Gas Co. v. Public Service Commission, supra;

Aetna Life Ins. Co. v. Haworth, supra;

N. C. & St. L. Ry. Co. v. Wallace, supra;

United States v. West Virginia (1935), 295 U. S. 463, 79 L. Ed. 1546.

In fact, suits for injunctions against state officers have also included or been coupled with suits by the same parties, against the same state officers, seeking declaratory relief.

Gully v. Interstate Natural Gas Co., supra;

Sovereign Camp v. Wilentz (1938), 23 F. Supp. 23.

4. In the event the Court is not persuaded to reverse the decree upon the basis of the record before it, the cause should be remanded for further proceedings, as proposed by plaintiff's motion to remand heretofore filed.

It is proper to remand a cause pending on appeal, for supplementary proceedings in the trial court,

where subsequent events have occurred, not shown in the record, which have material bearing on a proper determination.

Ballard v. Searls (1889), 130 U. S. 50, 32 L. Ed. 846;

Drainage District No. 7 v. Sternberg (1926), 15 F. (2d) 41;

Jensen v. New York Life Ins. Co. (1931), 50 F. (2d) 512;

Simonds v. Norwich Union Indemnity Co. (1934), 73 F. (2d) 412;

Central California Canneries Co. v. Dunkley Co. (1922), 282 Fed. 406;

Levinson v. United States (1929), 32 F. (2d) 449;

Isgrig v. United States (1939), 109 F. (2d) 131.

Supplementary proceedings and proof are proper when they tend to confirm a good cause of action originally *pleaded,* or to justify further relief along the same lines.

Rule 15(d), Federal Rules of Civil Procedure;

Jenkins v. International Bank (1888), 127 U. S. 484, 32 L. Ed. 189;

Texarkana v. Arkansas Gas Co. (1939), 306 U. S. 188, 83 L. Ed. 598;

Napier v. Westerhoff (1907), 153 Fed. 985;

Kryptok Co. v. Haussmann & Co. (1914), 216 Fed. 267;

Insurance Finance Corp. v. Phoenix Securities Corp. (1929), 32 F. (2d) 711;

International Ry. Co. v. Prendergast (1928), 29 F. (2d) 296.

Such a remand for supplementary proceedings is particularly proper where jurisdictional defects of an otherwise good case may thereby be cured.

Parker Washington Co. v. Cramer (1912), 201 Fed. 878;

Chicago, Rock Island & Pacific Ry. Co. v. Stevens (1914), 218 Fed. 535;

Chicago & A. R. Co. v. Allen (1917), 249 Fed. 280;

Ward v. Morrow (1926), 15 F. (2d) 660;

Coppedge v. Clinton (1934), 72 F. (2d) 531.

The supplementary showing proposed by plaintiff is directly material; it establishes that defendant, purporting to act officially, claims that the law is valid and that the power to prosecute exists, and has entertained that view and intention from the beginning. The proposed supplementary showing does not attempt to set up any new cause of action, arising because of defendant's actual prosecution.

Whether the proposed showing is sufficient to sustain the plaintiff's contention is essentially for the trial court to determine; the only question to be considered by this Court is whether it reasonably tends to that end.

Ballard v. Searls, supra;

Jensen v. New York Life Ins. Co., supra;

Central California Canneries Co. v. Dunkley Co., supra.

The supplementary showing does not indicate any lack of an adequate jurisdictional amount; the value of the matter in controversy is not measured by the

amount sought to be recovered in the state suit, but by the value of the right sought to be protected in the instant case.

Healy v. Ratta (1934), 292 U. S. 363, 78 L. Ed. 1248;

Bitterman v. L. & N. R. Co. (1907), 207 U. S. 205, 52 L. Ed. 171;

Glenwood L. & W. Co. v. Mutual Light, etc. Co. (1915), 239 U. S. 121, 60 L. Ed. 174;

Western & Atlantic R. Co. v. Railroad Commission (1923), 261 U. S. 264, 67 L. Ed. 645;

Adam v. New York Trust Co. (1930), 37 F. (2d) 826.

V. ARGUMENT.

FOREWORD.

The essential question presented by this appeal is whether the trial court erred in concluding, from the undisputed facts, that no actual case or controversy is here presented within the scope of the judicial power of the United States courts. While seven separate specifications of error are presented and argued in this brief, in effect they all relate to that single question.

Plaintiff asserts that an actual controversy is shown to be presented here, because:

(1) The record shows that the parties advance and maintain opposing claims as to the powers and duties of defendant with respect to the enforcement of the Arizona Train-Limit Law;

(2) The existence of such conflicting claims, duly maintained and advanced by parties properly having an interest in the subject matter, is sufficient to constitute a case or controversy warranting the exercise of the powers conferred by the Declaratory Judgments Act (28 U. S. Code 400);

(3) Although defendant is sued herein in his individual capacity, and not "as Attorney-General", he has an actual interest in the subject-matter, and is a proper and necessary party to the present controversy.

In the following argument, our specifications of error are presented in three groups, corresponding to the three points just stated. In connection with and as ancillary to the first group, we also argue Specification No. 1, addressed to the trial court's error in disregarding the unchallenged record, and amending the order on pre-trial conference, so as to permit defendant to withdraw and abandon his admission, duly made and recorded at the pre-trial conference, that he claimed and maintained the power and duty of prosecution under the law.

We ask this Court to bear in mind, *first,* that no disputes of fact arise in the case, the only evidence, apart from defendant's admissions of the greater part of the allegations of the complaint, having been defendant's affidavit, and his deposition taken by plaintiff prior to trial; and *second,* that we do not contend that the trial record establishes any controversy between

the parties as to the *abstract* question of the constitutionality of the Train-Limit Law, considered apart from the question of defendant's claimed power and duty of enforcement. The defendant has admitted, and the trial court has therefore found to be true, not only the plaintiff's verified allegations of fact from which may be and are drawn the legal conclusions that the law is invalid for various reasons, but also those paragraphs of the complaint (Nos. XII, XIII and XIV; R. 34-38) in which such invalidity is in precise terms alleged.

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1. THE RECORD SHOWS THAT THE PARTIES ADVANCE AND MAINTAIN OPPOSING CLAIMS AS TO THE POWERS AND DUTIES OF DEFENDANT WITH RESPECT TO THE ENFORCEMENT OF THE ARIZONA TRAIN-LIMIT LAW.

(Specifications of Error Nos. 1, 2, and 3.)

The opposing claims of the parties, as developed by the trial record, are as follows:

Plaintiff claims and asserts that the Train-Limit Law conflicts with the Federal Constitution and is therefore invalid, and that defendant, who occupies the office designated in the Train-Limit Law as clothed with the duty of enforcement, therefore has no power or duty under said law.[1]

Defendant, on the other hand, though admitting both plaintiff's allegations of fact as to the law, and

1. No question arose in the trial court, and none arises in this appeal, as to plaintiff's position. Its claim that the law is invalid (and that the power and duty of enforcement therefore do not exist) is set forth in paragraph XV of the complaint (R. 38-40), as well as in various other paragraphs. A portion of paragraph XV is incorporated in Finding No. 6 of the trial court's findings of fact (R. 113-114).

the conclusions of invalidity predicated thereon, claims and asserts that the power and duty of prosecution nevertheless continue, and declares that he has never said, and never will say, that he will refrain from effort to enforce the law or refuse to enforce it.

In short, the controversy relates, as before stated, not to the question of the constitutionality of the law, but solely to the question whether the defendant *presently* (i. e., in advance of any final judicial determination) has any power or duty of enforcement in the event of violation.

The defendant's position in this regard is shown in various ways: (1) by his admissions and assertions, made in the course of his oral testimony on deposition; (2) by his having taken the oath of office, and thereby stated his intention to fulfil the duties of the office (one of which is the enforcement of the Train-Limit Law, if violated) and particularly by his refusal to disavow the intention and purpose of carrying out such official duty; (3) by the forthright admissions made on his behalf at the pre-trial conference, which were preserved in the original pre-trial order.

During defendant's deposition, after he had admitted that he had twice taken the oath as Attorney General, and thereby declared his intention of discharging the duties of that office faithfully and impartially, he also said (R. 132) that that oath called upon him to carry out the duties of Attorney General; and that he had no doubt, if the Train-Limit Law was constitutional, that he must enforce it in the event of viola-

tion; also stating, however, that no violation had occurred since he had been Attorney General.

Later, in the course of his deposition, the following question and answer appear (R. 141):

> "Q. Of course, you agree that if the law is violated, why, it will then be and it is right now your official duty to prosecute every violation?
>
> "A. Prosecution if it is violated and if it is in violation, but there has never been any violation in the State of Arizona called to my attention and there is still doubt in my mind whether the law is constitutional or unconstitutional, and before I ever take any steps to do anything, I certainly would spend some time to go into the law and determine it is or not."

Although defendant thus expressed doubt as to the validity of the law, he apparently had no doubt at all of his continuing duty to prosecute, if a violation should occur, *prior* to a judicial determination of validity.

It is neither inconsistent nor improper for defendant to admit, or maintain the opinion, that the law is worthless and invalid, and at the same time to claim that in the event of violation he has and must exercise the power and duty of enforcement. Indeed, his statement last above quoted draws a clear and proper distinction between his personal belief and his official duty. It is immaterial whether the Court adopts the view that defendant, as an individual, and because of lack of time, money and inclination to investigate, has

no opinion at all as to the constitutionality of the law (the position indicated by his initial affidavit: R. 47-49; and likewise in his answer: R. 52-70), or whether it believes that the admissions made at the pre-trial conference are actual admissions of unconstitutionality, made after deliberation, and really represent a present and continuing state of mind. Defendant's opinion as an individual, or even as Attorney General, is to be distinguished from the duty which he undertakes in assuming the office and subscribing the oath. That duty (which Joe Conway *alone* can perform) arises from the oath of office, from the statute itself, and from the provisions of the Arizona Constitution and laws prescribing his powers and duties. The language of the Train-Limit Law is mandatory: it declares that the penalties *shall* be recovered, and suits therefor brought, by the Attorney General or under his direction in the name of the State. As the Supreme Court said, in:

> *Pennsylvania v. West Virginia* (1923), 262 U. S. 553 (at p. 592), 67 L. ed. 1117,

in a case involving a somewhat similar statute of West Virginia:

> "It leaves nothing to the discretion of those who are to enforce it. On the contrary, it prescribes a definite rule of conduct and in itself puts the rule in force."

Moreover, there is the general presumption, universally recognized, that a statute duly enacted is valid and constitutional; and this presumption prevails

until invalidity has been determined by final judgment of a competent court.

South Carolina v. Barnwell (1938), 303 U. S. 177 (191), 82 L. ed. 734;

Great Northern Railway Co. v. Washington (1937), 300 U. S. 154 (160), 81 L. ed. 573;

Alaska Packers Assn. v. Industrial Accident Commission (1935), 294 U. S. 532, 79 L. ed. 1044;

Concordia Ins. Co. v. Illinois (1934), 292 U. S. 535 (547), 78 L. ed. 1411.

This principle has been recognized and stated many times by this Court; compare its recent decisions in:

Inter-Island Co. v. Territory (CCA 9th, 1938), 96 Fed. (2d) 412, 419;

Nev. Cal. Electric Securities Co. v. Irrigation District (CCA 9th, 1936), 85 Fed. (2d) 886, 906.

The presumption of constitutionality is recognized by the Supreme Court of Arizona, and therefore binding upon the Attorney General of that State:

A. T. & S. F. Ry. Co. v. State (1928), 33 Ariz. 440, 265 Pac. 602;

Arizona Bank v. Crystal Ice & Cold Storage Co. (1924), 26 Ariz. 205, 224 Pac. 622;

Black & White Co. v. Standard Oil Co. (1923), 25 Ariz. 381, 218 Pac. 139;

Smith v. Mahoney (1921), 22 Ariz. 342, 197 Pac. 704;

Timmons v. Wright (1921), 22 Ariz. 135, 195 Pac. 100;

State v. Anklan (1934), 43 Ariz. 362, 31 P. (2d) 888.

In the *A. T. & S. F. Ry. Co. Case,* which involved the validity of a police-power statute of the State, the Arizona Supreme Court said (265 Pac. 602, at p. 605):

> "The acts of the Legislature within constitutional limits are presumed to be valid and, because its discretion in determining what the interests of the public require and what measures are reasonably necessary to protect them is very large, the courts are reluctant to interfere with its work and will not do so unless it is clear that it has gone beyond the bounds of the fundamental law."

In fact, the mere opinion of defendant, even though rendered by him "as Attorney General", is really nothing more than advisory; and, until and unless a competent court approves and adopts it, has no binding effect upon the State, or the State courts, or any of its officers. In:

Austin v. Barrett (1932), 41 Ariz. 138, 16 P. (2d) 12,

certain county officers, sued for having approved payments without statutory authority, pleaded in defense that such payments had been ruled valid by an opinion rendered by the Attorney General of the State, many years previously, upon which they and other county officers had ever since relied. The Arizona Supreme Court rejected their plea, saying (16 P. (2d), at p. 16) that while there had been no intentional misconduct, in that they had simply followed a custom of long

standing, approved many years previously by an opinion of the Attorney General, nevertheless they must be held liable. In:

Hartford, etc., Co. v. Wainscot (1933), 41 Ariz. 439, 19 P. (2d) 328,

similar reliance by County officials upon the legal opinion of the officers designated by law as their advisors was held to be no defense; the Supreme Court of Arizona saying (19 P. (2d), at p. 331):

> "There is no doubt that under our law the responsibility placed upon boards of supervisors of counties is extremely onerous. Neither good faith on their part nor legal advice by the officers designated by law as their advisors will protect them against liability * * * if it be finally determined that the expenditure involved was not authorized by law (Citing cases). * * * We are satisfied that in this case all of the defendants acted in good faith and under legal advice, but as we have stated that is no defense to the action."

It follows that defendant's opinion, even though officially rendered, does not take the place of a valid final determination by a competent court, nor operate, apparently, to estop defendant or his successor from prosecuting in the event of violation. As defendant himself has expressly recognized (R. 140), and as the courts have universally held, the sole power and duty of rendering an effective opinion which will establish invalidity, and thus prevail against the presumption of constitutionality, resides in the courts alone.

Canadian Northern Ry. Co. v. Eggen (1920), 252 U. S. 553 (562), 64 L. ed. 713;

United States v. Butler (1936), 297 U. S. 1 (62), 80 L. ed. 477;
16 *Corpus Juris Sec.* 201-204, and cases cited.

In the trial court defendant contended, in substance, and presumably will again contend, that his admission of unconstitutionality, in and of itself, and without need for further statement, is equivalent to a declaration that the power and duty of prosecution do not exist; that every semblance of controversy has thus been removed from the case; so that nothing now remains by way of dispute between the parties to which jurisdiction, dependent upon the existence of an actual case or controversy, may be said to attach. We anticipate that in this behalf defendant will rely strongly upon the expressions of the Supreme Court, in its opinion in:

Ex Parte LaPrade (1933), 289 U. S. 444, 77 L. ed. 1311.

Whether the *LaPrade decision* is in any sense an authority in the present case is very doubtful, in view of the circumstances out of which it arose. However, it may be noted that in that case the Supreme Court said (at p. 449):

> "Petitioner *might* hold,[2] as plaintiffs maintain, that the statute is unconstitutional, and that *having regard to his official oath* he rightly may refrain from effort to enforce it." (Emphasis supplied.)

2. "Hold", as here used, is obviously in the sense of "believe"; because only a court could "hold" the law to be invalid. In other words, the word is evidently used in *one* of the many dictionary meanings given to it: "to maintain a position or condition"; and not in the *other* sense: "to decide; lay down the law".

This defendant has never availed himself of the apparent opportunity of disclaiming his official duty which the Supreme Court's language seems to afford. To the contrary, he emphatically declared that he had "never made and never would make" any public or private announcement to that effect. Compare the following excerpts from his deposition (R. 133; 141):

> "I don't recall that I have ever made a statement one way or another on the proposition that, having regard for my oath of office, there was any duty written into a state statute, such as the duty of prosecution for violations, which I would fail to perform. I don't recall that I have ever commented upon the question whether, having regard for my oath of office, there was any state statute which I would refrain from enforcing or refuse to enforce."
>
> * * * * * * *
>
> "Q. (By Mr. Mason): You never made any public announcement that you would refrain from the enforcement of it (The Train-Limit Law) or any private announcement?
>
> "A. I never have, and what is more, I never will; but until there is a violation of the law I don't think it is the duty of the Attorney General to go through the statute books and, as you say, there are fifty-two or fifty some odd different sections in there that the Attorney General should prosecute or should attempt to uphold the laws, but until the occasion arises, we have plenty of other work without looking for it."

These statements should leave no doubt that even though the *LaPrade Case* be construed as presenting

to the Attorney General an avenue of escape from his obligation, as set forth in the statute and undertaken by him when he assumes his office and takes his oath, this defendant, having had the very language of the Supreme Court in the *LaPrade Case* particularly called to his attention, has definitely declared that he has *not* availed himself of that avenue of escape, and intends *never* to do so. In short, he still maintains, as the admissions previously quoted show, that, irrespective of his personal opinion as to the constitutionality of the law, it is and will continue to be his duty to prosecute for every violation of the Train-Limit Law which may occur, until and unless the invalidity of that statute be adjudicated by a competent court and, in consequence thereof, the non-existence of the power and duty of prosecution be finally determined.

We repeat that no inconsistency is presented when an enforcing official, *as an individual,* takes or maintains the position that a law infringes the Constitution, and at the same time announces his belief that it is his duty, under his oath of office, to proceed to enforce it, until or unless the decision of a competent court overcomes the presumption of validity. That attitude is wholly consistent with the constitutional assignment of powers and duties among the legislative, executive and judicial branches. Attorneys General and prosecuting officials of the highest character and attainments traditionally hold the view that until advised to the contrary by a court of competent jurisdiction they will enforce a prohibitory statute as it is

written. Particularly is this true where, as here, the invalidity of the statute does not appear on its face but requires proof of collision with the Commerce Clause and infringement of the Fourteenth Amendment.

Section 9 of Article 6 of the Arizona Constitution provides that the powers and duties of the Attorney General shall be "as prescribed by law"; Section 4396 of the 1928 Revised Statutes of Arizona provides for the issuance of a writ of mandamus to compel the performance of official duties, and Section 52 of the same revised code provides that "the Attorney General shall perform" (certain enumerated duties) and "such other duties as may be required by law". The language of the Supreme Court, in the *LaPrade Case,* that the Attorney General might hold "that the statute is unconstitutional and that having regard to his official oath he rightly may refrain from effort to enforce it", is merely a recognition of the principle that an officer upon whom mandatory duties are cast by a statute may nevertheless, if he believes the statute to be unconstitutional, decline to perform those duties until and unless commanded to do so by a court of competent jurisdiction. Underlying that principle are several considerations: *first,* that an unconstitutional statute is not ordinarily a defense to a suit for damages against the individual who, under color of his office, injures another by enforcement; *second,* that if the statute is eventually, as the official thinks it should be, declared unconstitutional, he may be held liable upon his official bond if he meantime enforces it;

and *third,* that the Legislature cannot effectively command a public official to do an unlawful act. Indeed, special proceedings for a writ of mandamus are in general use to test the validity of statutes; in some cases, where the defendant officer genuinely believes a statute to be unconstitutional, and, in others, where he simulates that belief for the purpose of having a judicial decision as to his duty to obey the statute.

And it may be said in passing that the case at bar, wherein the plaintiff believes that the law is unconstitutional and imposes a daily burden which it cannot escape by violating the law and submitting to prosecution, and the defendant, admitting those allegations to be true, nevertheless says that it is his duty to enforce the law, is closely analogous to a mandamus proceeding. In the instant case, as the pleadings stand, the relief sought is a declaration that it is defendant's duty as an individual to refrain from enforcing the Train-Limit Law under color of his office; while, if this were a mandamus proceeding under Section 4396 of the 1928 Arizona Revised Statutes, which provides for the issuance of a writ of mandamus to compel the performance of official duties, the relief sought would be upon allegations that the law was constitutional, had been violated and that the defendant having refused to prosecute because, in his opinion, the law was unconstitutional, should be compelled to do so because his opinion was erroneous, and was no excuse for non-performance of his statutory duty. In either event, the ultimate issue in controversy would be (as it is here) whether or not the power and duty of enforcement exist.

The proceedings at the pre-trial conference; the trial court's error in failing to give full effect to such proceedings.

At the pre-trial conference, the Court questioned defendant's counsel to determine his attitude toward each paragraph and allegation of the complaint. As to paragraph I, the Court's question and the answer of defendant's counsel were as follows (R. 75-76):

> "THE COURT. Well, then, to go back to the complaint, all of Paragraph 1, apparently, is admitted except, as I stated before, the beginning of line 15 on page 2—— 'As such, under the Constitution and laws of that state, there is vested in him the exclusive power, and upon him is imposed the mandatory duty, to commence and prosecute and to direct the institution and prosecution of, suits for penalties for every violation of the Arizona Train-Limit Law, the statute, the validity of which constitutes the subject-matter of the instant controversy.'
>
> "Now it is true, you admit all of Paragraph 1?
>
> "MR. STROUSS. Yes, we admit that latter part involved, but in the case of a constitutional law."

Each other paragraph of the complaint was then taken up, in its numerical order, until paragraph XVI was reached; and the Court asked the following specific question (R. 90):

> "THE COURT. 16, the whole of 16 is admitted?"

Defendant's counsel replied (R. 90):

> "MR. STROUSS. Is admitted, yes."

As contemplated by Rule 16 of the Federal Rules of Civil Procedure, the Court made its order, dated De-

cember 1, 1939 (R. 92-93), "reciting the action taken at the conference", and showing in particular that paragraphs I and XVI of the complaint had been admitted as true, in common with nearly all the remaining paragraphs. The order concluded with the declaration that at the trial of the case "plaintiff will not be required to offer proof in support of any of the admitted allegations".[3]

Rule 16 provides that an order entered upon pre-trial conference "controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice". On December 12, 1939, immediately prior to the commencement of the trial, though without any assertion that the reported record of the pre-trial conference was incorrect or should be changed, or any showing or even assertion the order as made "would result in manifest injustice", and indeed without any prior notice to plaintiff of his intention, other than a letter to plaintiff's attorney, dated December 8, 1939, alleging that the order on pre-trial conference was "in error", defendant presented his motion (R. 93-95) to amend that order so as to show that he had *denied* paragraph I-b of the complaint, and also that portion of paragraph XVI reading as follows (R. 95):

> "Said defendant claims and maintains that it is and will be his duty, as Attorney General, to prosecute and sue plaintiff for each and every violation of said act which it may commit."

3. The Court's order failed to recite that paragraph II-d was admitted, although the record of the pre-trial conference shows that such was the fact. This omission was subsequently corrected by consent.

In support of the motion, defendant through his counsel again asserted that *the Court* had *erred,* and also that the admissions of those allegations, as shown by the pre-trial transcript, were "inadvertent" (R. 127). Plaintiff opposed the motion, particularly in so far as it related to the admission of the above-quoted portion of paragraph XVI; but the Court permitted the amendment.

We assert that this modification was clearly not warranted, either upon the basis of the record before the Court, or as a matter of discretion for the purpose of "preventing manifest injustice". Indeed, the modification resulted in manifest injustice and substantial prejudice to plaintiff, which otherwise would not have occurred.

Defendant's assertion that the original order was erroneous requires only brief consideration. The record shows that defendant admitted all of paragraph I, including the allegation of his statutory and constitutional duty, as Attorney General; the only attempted qualification having been that such power and duty were conferred "in the case of a constitutional law" (R. 76). Obviously, that qualification was not a denial, as apparently argued by defendant in his motion to amend; and although it might have been proper for the Court's pre-trial order to have referred to the qualification, its omission did not warrant substitution of a *denial,* when the paragraph was *in fact admitted.*

The record equally shows that defendant admitted *all* of paragraph XVI, *without qualification.* It cannot be said that defendant or his counsel were trapped

or tricked or misled into this admission, or deprived of full opportunity to review the complaint and weigh the effect of the admission. The transcript shows that the Court's question, and counsel's reply, were deliberate. Clearly then, *on the record,* the original order showing this admission was not erroneous.

We emphasize that defendant, in offering his motion to amend, did not contend that the pre-trial *record* was erroneous, or that the Court's original pre-trial order did not correspond to that record. No such contention could have been maintained. Furthermore, no motion was noticed or made to re-open the pre-trial conference for a further showing by defendant; and the Court's order allowing the amendment did not in any way change the pre-trial record. In short, the amendment was presented to the Court, and approved, *in spite of the record;* and both the amendment and the amending order were wholly without record support.

As we have stated, defendant's counsel asserted that the admission of paragraph XVI, in particular, was "inadvertent" (R. 127); and we anticipate that this argument may be made again, reference being made by defendant to his answer (Par. XXIII, R. 68), in which appears a specific denial of that part of the language in paragraph XVI which, by the amended order, is shown as having been denied (R. 94, 95). Defendant may also refer to the contingent denial of somewhat similar language elsewhere in the complaint, for example in paragraph XV: compare paragraph XXII of his answer (R. 66-67). The prior denial of this particular language, by defendant's *answer,* has no sig-

nificance as showing defendant's position at the time of the pre-trial conference. Other paragraphs of the complaint, or portions thereof, were in the *answer* denied either outright or with qualifications (i. e., lack of information or interest). Yet at the pretrial conference those denials were replaced by unqualified admissions. The defendant's whole attitude at that conference demonstrated an intention to admit every fact alleged in the complaint, so far as he could consistently with the views stated in his deposition.

This is particularly true of the admission of paragraph XVI, as that admission appears in the pre-trial record. While the defendant stated in his deposition that in his private opinion the law was worthless (R. 140), he also agreed that in the event of violation it was and would be his official duty to prosecute (R. 141), and declared further that he never had said and never would say, publicly or privately, that with his official oath in mind, he would refrain from enforcement (R. 133, 141).

We have no doubt that the defendant will argue that the trial court has complete discretion over pre-trial proceedings, and may make such order as it deems proper. It may be conceded that the discretion of *regulating* the *proceedings* does exist; but such discretion must be exercised judicially *and not abused.* Where the record is plain and unchallenged, as in this case: where no action is undertaken to reopen the proceedings or correct the record: where the accuracy of the reporter's transcript, so far as concerns the point in issue, is undisputed: then the entry of an order

which does not correctly reflect the record, and indeed, as here, states the precise opposite, clearly exceeds the bounds of judicial discretion, and the action taken is wholly unwarranted and erroneous.

There are comparatively few decisions in which the effect of pre-trial proceedings upon the subsequent course of a case has been considered.

In:

Byers v. Clark (1939), 27 F. Supp. 302,

the United States District Court for Oregon held that after pre-trial conference held, and order made, counsel for defendant would not be allowed to make a supplemental admission at the trial of the case, the effect of which would be to disrupt the orderly presentation of the plaintiff's case.

If it is improper to permit a supplementary *admission* by a defendant (although plaintiff would perhaps be favored thereby), it is all the more improper to permit a defendant, without notice and in contradiction of the unchallenged record, to withdraw an admission duly made in open court, and substitute therefor a denial.

In:

Miles Laboratories v. Seignious (1939), 30 Fed. Supp. 549,

it was held, in accordance with the provisions of Rule 16, that *admissions made at the pre-trial conference* obviate any necessity of later proof of the matters admitted. This case therefore supports reliance by plaintiff (and by this Court) upon the *record of the pre-*

trial conference, regardless of the subsequent erroneous "correction" of the trial court's initial order entered in response to that record.

Pre-trial practice has prevailed in certain courts of Massachusetts for several years; and recent decisions of the Supreme Court of that State indicate the scope and effect of pre-trial procedure.

In:

Fanciullo v. B. G. & S. Theatre Corp. (Mass., 1937), 8 N. E. (2d) 174,

the Court held that an order made on pre-trial conference was binding, and that the parties were foreclosed from amending, or disavowing a showing made in reliance thereon.

In:

Eckstein v. Scoffi (Mass., 1938), 13 N. E. (2d) 436,

the report and order on pre-trial conference were also treated as binding, and affording a proper basis for the Court's decision.

In:

Finegan v. Prudential Ins. Co. (Mass., 1938), 14 N. E. (2d) 172,

the order made on pre-trial conference was likewise treated as controlling upon the parties in the conduct of the trial.

It will be noted that in each of these Massachusetts cases no question was apparently raised as to whether the pre-trial order correctly reflected the admissions and denials of the parties, at the pre-trial conference.

It is presumed, of course, that the *order* on pre-trial conference will correspond to that *record,* and not (as erroneously "corrected" in the present case) undertake to set forth the precise contrary.

Since there was clearly no error in the original pre-trial order, and it was never asserted that, in the respects here considered, the pre-trial *record* was in the least erroneous, the only basis upon which the modification of the original order may be supported is that it was necessary "to prevent manifest injustice". A brief consideration of the circumstance will, we think, convince this Court that instead of *preventing* manifest injustice, the "correction" *creates* very serious injustice and prejudice to the plaintiff; whereas defendant would suffer no injustice at all, under the original order.

The circumstances to be considered are these: The original order showed that defendant had admitted not only all of the probative facts, but all of the conclusions pleaded by plaintiff, going to show that the Train-Limit Law was invalid and unconstitutional; that he had denied holding any opinion or making any claim that the law was valid, though admitting (Complaint, par. I-b) that the Constitution and laws of Arizona cast upon him the power and duty of enforcement, and (par. XVI) that he claimed, presumably even though not asserting the law's validity, that such power and duty existed. As we have shown, there was no inconsistency in his taking that position. The stage was thus set for entry of a judgment which would fully determine the case; for even though the parties were

in agreement as to the ultimate facts upon which the Court's conclusions were to be predicated, and defendant, in his individual capacity, was shown as holding the view that the law was invalid, nevertheless the parties were in controversy as to the defendant's powers and duties.

In these circumstances, no injustice to defendant could possibly have followed, if a judgment were rendered declaring the law void, and that he had no duty, either individually or officially, to enforce it or take any action thereunder. If defendant were sincere in his private opinion (R. 140) that the law is of no value, then presumably he would welcome a formal judgment wholly relieving him of any apparent statutory duty of prosecution; and such a judgment, since it would respond to stipulated and presumably well-known facts, would represent, not injustice to the defendant, but the only just and equitable solution of the case.

On the other hand, the serious injustice to the plaintiff, following from the modification, is plain and unquestionable. It is apparent that plaintiff relied, as well it might, upon the trial court's order of December 1, 1939, particularly since it was an accurate recital of the pre-trial proceedings, at least in so far as paragraphs I and XVI were concerned; and relied particularly upon the Court's statement (R. 93) that it would not be required to offer proof in support of the allegations thus admitted. At all stages in this case, the only serious question presented has been as to the existence of an actual controversy. With de-

fendant's admission, openly made and properly preserved of record by the trial court's original order, that he claimed and maintained the power and duty of prosecution under the law—a claim which necessarily and vitally affects plaintiff, and which plaintiff of course has consistently opposed—there could be no doubt of an actual controversy. Plaintiff was thus compelled, on the date of the trial, to face the withdrawal of an admission vital to the case, and the necessity of making proof upon a point as to which the Court had announced that none would be required. It could, of course, have requested a postponement, thus suffering further delay, but in view of the continuing irreparable damage (admittedly more than $800.00 per day), and the likelihood of substantial delay, it preferred to proceed.

This Court should conclude that the modification of the pre-trial order operated to plaintiff's grave prejudice; that it was neither warranted on the face of the record, nor under the rule, for the purpose of preventing manifest injustice to defendant; and that the modification should be disregarded, and the cause considered upon this appeal from the standpoint of the actual record made at the pre-trial conference, and the order in response thereto originally entered.

2. THE EXISTENCE OF CONFLICTING CLAIMS, DULY MAINTAINED AND ADVANCED BY PARTIES PROPERLY HAVING AN INTEREST IN THE SUBJECT MATTER, IS SUFFICIENT TO CONSTITUTE A CASE OR CONTROVERSY WARRANTING THE EXERCISE OF THE POWERS CONFERRED BY THE DECLARATORY JUDGMENTS ACT (28 U. S. CODE 400).

(Specifications of Error Nos. 4 and 5.)

The leading decision of the Supreme Court, establishing the requisites of a "case or controversy" in a declaratory-judgment suit, is:

Aetna Life Ins. Co. v. Haworth (1937), 300 U. S. 227, 81 L. ed. 617.

The essential facts of that case, as set forth in the plaintiff's complaint therein, were:

The plaintiff insurance company had issued to the defendant certain policies which provided, among other things, that in the event of total and permanent disability the company would pay defendant a stated monthly income, waive further premium payments, and extend other benefits. Some time after receiving the policies the insured ceased to pay premiums, and claimed the stipulated disability benefits. These claims were presented in ordinary form; but the insured took no further steps, other than to discontinue premium payments. Particularly, no action at law had been instituted by defendant either to obtain the benefits, or to determine the validity of the policies.

The plaintiff had at all times refused to recognize the defendant's claims, insisting on the contrary that the policies had lapsed for nonpayment of premiums, and no longer had substantial value. Because of defendant's claims, and plaintiff's inability to obtain a

determination whether he was in fact disabled, it faced a contingent liability for the payments provided in the policies, and also had to maintain substantial reserves upon the policies; and there was also the danger, if a determination were postponed until the death of the insured, of losing material evidence through disappearance, illness, or death of witnesses.

The District Court granted defendant's motion to dismiss the complaint, holding (11 F. Supp. 1016) that it did not set forth a "controversy" in the constitutional sense, and hence did not come within the scope of the Declaratory Judgments Act. That ruling was affirmed by the Circuit Court of Appeals for the Eighth Circuit, Circuit Judge Woodrough dissenting (84 F. (2d) 695). The Supreme Court reversed the judgment of the Circuit Court, holding that an actual controversy was duly presented.

In reviewing the case, it is desirable to examine first the majority opinion in the Circuit Court, because it sets forth concisely the contentions reviewed and rejected by the Supreme Court; and because, further, it proceeds along the same lines as the argument heretofore made by defendant in the instant case, and cites many of the authorities upon which he has repeatedly relied. The pertinent portions (84 F. (2d) at p. 697) of the Circuit Court's opinion are reproduced in the appendix.

In its opinion, the Supreme Court first discussed the essentials of a controversy; not, however, for the purposes of declaratory-judgment proceedings *only,*

but of *all* adversary proceedings in Federal Courts; and then applied that discussion to the facts of the case before it. We include, in the appendix, excerpts from the Supreme Court's opinion (300 U. S., at pp. 239-241, 242-244).

The close parallel between the instant case and the cited case is readily evident. In that case, as the Court pointed out, the "parties had taken *adverse positions* with respect to their *existing obligations*". So, in this case, the parties take equally "adverse positions" with respect to their existing obligations: plaintiff contending, on the one hand, that it need not comply with the Train-Limit Law, and is not subject to prosecution in the event of violation; while defendant admits that he has taken an official oath which in terms requires him to prosecute for each violation, that he has never said and never will say that he intends to refrain from enforcing the statute in accordance with the terms of his oath, and that it is presently his power and duty, as Attorney General, to prosecute in the event of violation.

The claim that the right and duty of prosecution exist, regardless of defendant's private opinion respecting the law's validity, is, to use the Court's language, "a claim of a present specific" power and duty. The plaintiff's claim that the power and duty do not exist, and that it is immune to prosecution and penalty, is equally definite and specific. Such a dispute is manifestly susceptible of judicial determination; it is precisely the same character of dispute which was presented and determined in the *Nevada Train-Limit*

Case (Southern Pacific Company v. Mashburn, 18 F. Supp. 393) where the principal basis of suit, as shown by paragraph IV of the special findings of the three-judge court, was that the defendant was expressly required by the terms of the Nevada statute to prosecute for violations, and had declared, in the event of violation, that he would carry out that duty.

To continue the parallel with the *Haworth Case:* If defendant had sued[4] to recover the statutory penalties imposed by the Train-Limit Law, there would be no question of the existence of a controversy. If, again, being advised that plaintiff contemplated a settled course of disregard of the law, defendant had brought suit to enjoin such violations, there would likewise be no question of controversy. However, "the character of the controversy and of the issue to be determined is", as the Supreme Court says, "essentially the same" whether presented in the first instance by the plaintiff or the defendant. If judicial power exists to entertain such a suit by the Attorney General, then equally it extends to a suit brought by this plaintiff; and, the other essentials of federal jurisdiction being satisfied, the suit properly lies in a Federal Court. As the Supreme Court emphasizes, "it is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative."

The parallel between the two cases extends still further. In the *Haworth Case* the plaintiff insurance

4. It is now shown and admitted that such a suit has now been brought; see plaintiff's motion to remand, filed in this Court on May 8, 1940; and defendant's opposition thereto, particularly his affidavit included therein as Exhibit A.

company, because of the possible liability in the event of a suit by the insured, and the absence of any determination as to the validity of the latter's claims, was compelled to incur substantial expense, and was apparently without adequate remedy at law for the irreparable loss thus occasioned. In the instant case it is admitted that plaintiff, because of the heavy cumulative penalties provided by the law, and the absence of any final and binding decision determining the law's validity (which decision would, of course, also determine whether the claimed right and duty of prosecution exists), incurs substantial continuing expense, and has no adequate remedy at law for the irreparable loss thus sustained.

Again, in the *Haworth Case* it was strongly argued —indeed, the Circuit Court held—that a controversy was lacking because the defendant was not acting, or threatening to act, in such a way as to invade or affect prejudicially the rights of plaintiff; and somewhat the same argument, though perhaps not in the same language, has been and may again be presented by defendant here. But the Supreme Court held (300 U. S., at p. 241):

> "Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised *although the adjudication of the rights of the litigants may not require the award of process* or the payment of damages. (Citing cases.) And as it is not essential to the exercise of the judicial power that an

injunction be sought, *allegations that irreparable injury is threatened are not required.*" (Emphasis supplied.)

In other words, a justiciable controversy, adequate for judicial determination, may exist, even though specific threats of formal action be lacking. It was therefore wholly unnecessary for the trial court to undertake any finding or determination herein that defendant had not threatened to enforce the law, or taken any action to that end; its Findings Nos. II and III (R. 110) are mere surplusage, and should be stricken.

The decision in the *Haworth Case* is in full accord with the Supreme Court's earlier decision in:

Nashville, Chattanooga, & St. Louis Ry. Co. v. Wallace (1933), 288 U. S. 249, 77 L. ed. 730.

Indeed, the *Wallace decision* is properly regarded as the leading case wherein the Supreme Court indicated that an action for a declaratory judgment may possess the requisites of a case or controversy, within the meaning of the Constitution, and thus properly be carried on in the Federal Courts.

The case was originally brought in a state court, under the State Declaratory Judgments Act of Tennessee, prior to the enactment of the present federal statute. It came to the Supreme Court on appeal from the decision of the highest court of the state. The initial question before the Supreme Court was, of course, whether it had jurisdiction, within the Federal constitutional provision limiting the judicial power to "cases and controversies". After reviewing the com-

plaint, and noting that it sought a declaratory decree that a state tax statute was unconstitutional, the Supreme Court held that an actual controversy, in the constitutional sense, was presented even though declaratory relief only was asked for. Pertinent portions of the opinion (288 U. S., at pp. 261-262) are set forth in the appendix.

Reviewing the facts of the instant case, in the light of the court's opinion, we find, to paraphrase that opinion, that the basic issue here presented (i.e., whether there exists the right and duty of prosecution, as defendant claims) would constitute a case or controversy, if raised and presented in a proceeding brought by plaintiff to enjoin such prosecution if it were threatened, or in the one recently brought by defendant to collect the penalties provided in the challenged law, because of alleged violations. The proceeding as to which a decree is sought is between adverse parties, one of which has been compelled (as the other admits) to yield obedience to the statute because of the heavy cumulative penalties provided therein; whereas the other claims and maintains that it is and will be his power and duty, in the event of violation, to proceed under color of his office to prosecute for each such violation.

To continue the paraphrase further, a valuable legal right (the right to be free of liability for such penalties) asserted by plaintiff, and as to which the adverse position of defendant and his essential interest therein, as the individual solely charged with the power and duty of enforcement, are fully set forth, will be di-

rectly affected and determined by the Court's decision. The question lends itself to judicial determination, and is of the kind which the Federal Courts traditionally decide: for example, the same essential question was presented and entertained in the earlier *Arizona Train-Limit Case (A. T. & S. F. Ry. Co. v. Peterson,* 43 F. (2d) 198; *Same v. LaPrade,* 2 F. Supp. 855); also by the special District Court of three judges for Nevada in the *Nevada Train-Limit Case (S. P. Co. v. Mashburn, Attorney General, supra*); and by the special three-judge District Court for Louisiana in the *Louisiana Train-Limit Suits*[5] *(T. & N. O. Ry. Co., et al. v. Porterie, Attorney-General, et al.,* not officially reported).

Moreover, the relief sought is a definitive adjudication of the disputed constitutional right of plaintiff, in the circumstances shown to be free of the contingent statutory liability. The plaintiff, whose asserted right to disregard the law without liability for penalty will be determined by the decision, is not attempting to secure a mere *abstract* determination of the validity of the statute, or a decision advising what the law would be on an *uncertain* or *hypothetical* state of facts; the determination will rest upon *concrete* facts, fully alleged and admitted; for the complaint specifies, in detail, the continuing burden of expense and interference [redacted] daily and continuously imposed upon plaintiff's operations.

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5. The *Louisiana Case* went no further than an interlocutory injunction against defendants, granted by a special three-judge court in December, 1936, upon affidavits, counter-affidavits and oral arguments.

In his discussion of the *Wallace Case* defendant, in an earlier brief in these proceedings, has asserted that no parallel to the instant case was presented, specifying three reasons, as follows:

(a) While the *Wallace Case* was a suit for declaratory judgment, it was under the Tennessee law, and not the federal statute;

(b) In that case the defendants "had demanded payment of the tax in a specified amount and * * * determined to enforce their demand"; while here there have been no acts or threats by defendant, either individually or officially; even the allegation that he claims and maintains that the law is valid being (so it is said) merely an erroneous assumption; and

(c) There the action was against the defendants in their official capacity, while here it is against Mr. Conway "as an individual"; in other words, in that case there actually existed an interest on the part of defendants, together with a legal relation with the plaintiff; whereas no such interest or relation exists in the instant case.

So far as defendant's point (a) is concerned, it is seen to be wholly without merit, when the essential nature of the question first considered and decided by the Supreme Court is examined. That question was whether a case or controversy was presented, within the meaning of Article III, Section 2, of the Federal Constitution. Whether the case originates in a State or a Federal Court, the Supreme Court's jurisdiction is circumscribed by the constitutional limitation, in the

same way and to the same degree as all other federal courts. Therefore, in defining a "controversy", to determine whether its own jurisdiction could be invoked, the Supreme Court was recording such definition, for similar purposes, for all other courts of the United States whose judicial powers rest upon Article III of the Constitution. The case is therefore squarely in point in its interpretation of the term "controversy", for purposes of federal-court jurisdiction.

In fact, it is fully apparent that this decision (rendered in February, 1933), which established that Federal Courts could exercise jurisdiction in cases where *declaratory,* rather than *coercive,* relief was sought, led to the enactment, at the next regular session of Congress (June 14, 1934), of the Federal Declaratory Judgments Act.

Defendant's point (b) is likewise without merit, and presents no essential distinction. The defendants in the *Wallace Case* had, as the opinion shows, demanded payment and determined to enforce their demand. In this case, it is quite true that prior to April 19, 1940, no actual demand had been made by defendant; but none was necessary, for the powerful effect of the penalty provisions of the challenged law had for years proved to be sufficiently persuasive to compel compliance. Defendant so conceded, when he admitted plaintiff's allegations (Complaint, pars. II-d, XV, XVI; R. 5, 39, 42) that it sustains continuing irreparable damage because of the law, but is unable and unwilling to disregard its provisions because of the enormous penalties to which it might be subject. There has never

been, moreover, any question of defendant's determination to enforce the demand embodied in the challenged law; he has admitted the existence of the power and duty of prosecution in the event of violation, and declared that he never has said, and never will say, as a means of avoiding that duty, that having regard for his official oath he intends to refrain from attempts at enforcement (R. 133, 141).

The distinction attempted in defendant's point (c) is likewise without significance. It is predicated upon his position that since he is sued "as an individual", he cannot be a party to a controversy concerning the subject matter of this suit, because as an individual he claims to have no substantial interest therein. This contention is discussed at greater length in the next succeeding subdivision of this brief; it will suffice here to point out that defendant, although sued "as an individual", is identified as the present Attorney General of Arizona, admittedly the individual who now occupies that office (R. 53), and the *only* individual upon whom is laid responsibility for enforcement of the challenged law; and consequently the *only* individual who, acting under color of that office, can effectively assert the existence of the power and duty of enforcement. As we show more fully hereafter, defendant's position is not to be distinguished from that of any other occupant of a state office who, as the individual charged with the duty of enforcing a state statute, has been made defendant in a federal proceeding brought to determine whether, under the Federal Constitution, such duty existed. Such a state official is necessarily

sued in the Federal Court *as an individual,* unless the state's consent to suit be given; yet there has never been any doubt, at least since the Supreme Court's decision in *Ex Parte Young* (1908), 209 U. S. 123, 52 L. ed. 714, that in that individual capacity he is a proper and necessary party to the controversy.

In a number of recent Federal cases, it has been held, just as in the *Haworth Case,* that an actual controversy may exist, warranting the exercise of jurisdiction to grant declaratory relief, even though there has been no overt threat by the defendant, or anything more than a statement of a claim adverse to that of the plaintiff.

Compare:

Gully v. Interstate Natural Gas Co. (1936), 82 F. (2d) 145 (149) (cited with approval by the Supreme Court in the *Haworth Case,* 300 U. S., at p. 244);

Edelmann v. Triple-A Specialty Co. (C.C.A., 7th, 1937), 88 F. (2d) 852 (854);

Bliss v. Cold Metal Process Co.[6] (C.C.A., 6th, 1939), 102 F. (2d) 105 (108);

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6. This decision is likewise particularly pertinent because, besides indicating that a controversy exists where there are conflicting claims of the parties as to the validity of an instrument (in this case a patent), it also declares that any doubt of the existence of a controversy in the case had been removed, by the filing of a suit, by the patentee, against the alleged infringer, such suit having been commenced after the declaratory judgment proceeding was started. The Court said (p. 108):

> "Since the filing of the bill it (defendant) has brought suit for infringement against the plaintiff itself. All doubts as to the existence of a present controversy are now dispelled."

The defendant in the instant case, who is in the same position as the claimant under a patent, because he claims the right and power to prosecute against infringement of the statute which purportedly confers certain powers and obligations upon him, has now (April 19, 1940) actually filed suit against this plaintiff for alleged infringements of the statute. "All doubts as to the existence of a present controversy are now dispelled."

Black v. Little (1934), 8 F. Supp. 867 (870);
Maryland Casualty Co. v. Hubbard (1938), 22 F. Supp. 697, (699-700, 702).

In the appendix hereto we include excerpts from the opinions rendered in these cases.

We ask the Court to note especially that in the *Haworth Case,* as in other cases of which the last three cited are typical, the Court sustained the propriety of a so-called "negative" declaration: i e., that an asserted obligation or liability did not exist. Such is precisely the relief sought here: a declaration, in effect, that defendant does *not* possess the power or duty of prosecution, and hence that plaintiff is *not* obligated to obey the challenged law, nor liable for penalties in the event of disobedience.

The authorities likewise establish the propriety of proceeding in the Federal Courts for a declaratory judgment, where the existence of powers dependent upon validity of a statute or ordinance is challenged on constitutional or other grounds. Indeed, the essential value of the declaratory proceeding is that the disputed question can be settled in advance of either violation, or the taking of definitive steps to compel compliance. Compare the *Gully, Black* and *Edelmann Cases,* supra; and also:

Wallace v. Currin (1938), 95 F. (2d) 856, 861;
In re N. Y., N. H. & H. R. Co. (1936), 16 F. Supp. 504, 505;
Sovereign Camp v. Wilentz (1938), 23 F. Supp. 23, 29;
Acme Finance Co. v. Huse (Wash. S. Ct. 1937), 73 Pac. (2d) 341, 77 Pac. (2d) 595, 114 A. L. R. 1345;

Tuscaloosa County v. Shamblin (Ala. S. Ct. 1936), 169 So. 234;

Milwaukee Gas Specialty Co. v. Mercoid Corp. (C. C. A., 7th, 1939), 104 F. (2d) 589, 591;

Fosgate Co. v. Kirkland (1937), 19 F. Supp. 152, 158.

The *Acme Finance Case* is of particular interest, in that the Supreme Court of Washington, after a discussion of the Uniform Declaratory Judgment Act (adopted in Washington), and the decisions in the *Wallace* and *Haworth Cases,* supra, entertained an action for a declaratory judgment to determine the constitutionality of a statute which, though enacted, was not to become effective until nearly a month after the case was begun. No steps had been taken by defendants, the enforcing officers, to compel compliance with the law. It was simply alleged (in the complaint) and admitted (by demurrer), that defendants intended to begin enforcement upon the effective date. The Court said:

> "The plaintiff and interveners were in this dilemma: If, on the one hand, they complied with the act on June 9th, and the act was in fact unconstitutional, they would do so to their damage. If, on the other hand, they refused to comply with the law, and they were wrong in thinking it unconstitutional, they would suffer the criminal penalties provided in the act. Either course was fraught with danger. To afford relief to parties in such a situation is the very purpose of the Declaratory Judgment Act.
>
> "The material consideration is that the case, as made, answered all the requirements of a jus-

> ticiable controversy. The plaintiff and interveners alleged that the defendant would enforce the law on and after June 9th, claimed that it was unconstitutional, and that they would therefore suffer legal damage. The defendant admitted that he would enforce the law as being constitutional on and after June 9th. Here was an interested plaintiff and an interested defendant, and they were in sharp controversy. The trial court was, therefore, compelled to take jurisdiction and render judgment."

The reasoning of the case is in line with the views of the Supreme Court, which held that an action to enjoin enforcement of an alleged unconstitutional statute was not prematurely brought, even though the statute by its very terms was not to become effective for a considerable period after the suit was commenced:

> *Pierce, Governor, et al. v. Society of Sisters* (1925), 268 U. S. 510, 535, 69 L. ed. 1070.

The situation in the instant case is closely analogous to that presented in a very recent case in this Court:

> *Caterpillar Tractor Co. v. International Harvester Co.* (Oct. 4, 1939), 106 F. (2d) 769.

The plaintiff, a manufacturer of tractors, had received from defendant a letter stating in substance that defendant had examined certain of the types of tractors recently brought out by plaintiff, and that they infringed defendant's patents. The letter declared defendant's purpose to insist upon recognition and enforcement of its rights, and requested that

manufacture of the infringing models be discontinued, and an accounting made for past use. The plaintiff thereupon brought suit for a declaratory decree of non-infringement. An actual controversy was alleged to exist because of defendant's asserted opposing claims, as set forth in its letter.

Defendant initially filed an answer denying the validity of the plaintiff's patents and asserting that its own were valid; but later, on the eve of the trial, it reversed its position and filed an amended answer admitting that no infringements existed as previously claimed. (Defendant in the instant case followed practically the same course). Upon motion of plaintiff, the lower court granted summary judgment, and rendered a declaratory decree of non-infringement accordingly. Upon this appeal the defendant raised two points, first, that the complaint did not set forth facts sufficient to show the existence of an actual controversy and, second, that the summary judgment was not proper in the circumstances.

This Court held, as to the first point, that the complaint, in that it set forth the actual opposing claims of the parties, "properly alleges a controversy to serve as a basis of jurisdiction of the Court, in this action for a declaratory judgment".

As to the second point, the Court held that, in view of the admissions of non-infringement in the defendant's supplemental answer, the declaratory decree was properly rendered, except as to one model as to which some question of fact actually existed.

The close similarity to the instant case is at once apparent. In the cited case, there was no actual prosecution by defendant, nor immediate threat thereof, nor anything more than an *assertion of a purpose* to insist upon recognition and enforcement of alleged rights. Certainly defendant in the instant case, even prior to his commencement on April 19, 1940, of the prosecution in the State Court, presented at least as vigorous, if not a stronger claim; for he asserted that the power and duty of prosecution were vested in him, and declared that he had never said, and never would say, that he intended to refrain. Furthermore, even though by its admissions of non-infringement the defendant in the cited case withdrew the questions "of fact" relating to its controversy with the plaintiff, so far as concerned the alleged infringement, the "actual controversy" was not abated. The declaratory decree was held proper as a determination of the dispute; and, except as to one minor detail, was affirmed. The case amply sustains our contention that defendant's admissions are not to be taken as abating the controversy; that plaintiff is instead entitled to a declaratory decree, which may be based upon defendant's admissions of fact, and is necessary to dispose of and determine the claim that the power and duty of prosecution exist under the challenged law.

Other recent federal cases in which a declaratory decree has been held proper, in order to settle the rights of one party to continue the manufacture and sale of a particular article, as against a claim of in-

fringement by a rival party, and even in the absence of a threat of prosecution or other action by the latter, include the following:

Zenie Bros. v. Miskend (1935), 10 F. Supp. 779;[7]

Interstate Cotton Oil Refining Co. v. Refining, Inc. (1938), 22 F. Supp. 678;

Booth Fisheries Corporation v. General Foods Corporation (1939), 27 F. Supp. 268;

Ladenson v. Overspred Stoker Co. (C.C.A., 7th, 1937), 89 F. (2d) 242.

The Court will, we think, recognize the close analogy between the instant case, and one involving alleged infringement of a patent, especially where the alleged or potential infringer brings the suit. A patent is in effect a charter to the patentee, conferring a more or less exclusive right which, under well-recognized principles, he may enforce by suit against an infringer, actual or threatened. The Train-Limit Law is likewise in effect a "charter" conferring (so far as the State may do so) exclusive powers and duties upon the Attorney General, which he may and must assert by suit against an infringer. But, just as one whose rights are affected by another's patent may (in *advance* of infringement) sue the patentee to determine whether the patent be valid, so may plaintiff, whose rights are affected by the "charter" under which defendant is empowered to prosecute, bring suit in advance of infringement (as it has done), to determine whether defendant's "charter" is valid.

7. In the Appendix we include a quotation from the opinion (10 F. Supp., p. 781).

Thus far we have discussed the question whether a controversy is here presented, from the standpoint of the defendant's admission and claim that he is vested with the power and duty of enforcement. But we maintain that even though defendant's attitude be viewed as merely negative, the admissions and claims just mentioned being disregarded for purposes of the argument, a justiciable controversy is still presented by the unchallenged facts. Two recent (1939) decisions of the Supreme Court sustain our position:

Rochester Telephone Corporation v. U. S. (1939), 307 U. S. 125, 83 L. ed. 1147;

Perkins v. Elg (1939), 307 U. S. 325, 83 L. ed. 1320.

In the *Rochester Case* the Court re-examined the well known rule of decision, initially established in *Procter & Gamble v. United States* (1912), 225 U. S. 282, and subsequently followed in many other cases, that when one has made complaint before a regulatory tribunal (such as the Interstate Commerce Commission), which after investigation has dismissed the complaint, denying relief, the complainant cannot maintain suit, as would otherwise be his right under federal law, to review such so-called "negative" action.

In the opinion in the *Rochester Case* the Court, after reviewing various types of proceedings before the Interstate Commerce Commission (selected as typical of federal administrative tribunals), and referring particularly to the necessity that a court proceeding to review a decision of the Commission must satisfy the constitutional requirements of a "case or

controversy", discussed the *Procter & Gamble Case* in some detail (307 U. S., at pp. 135-143). It said, in part (at p. 136):

> "Clearly Procter & Gamble was authorized under Section 13 of the Act to Regulate Commerce to institute the proceedings before the Commission. Since it asserted a legal right under that Act to have the Commission apply different principles of law from those which led the Commission to dismiss the complaint, the ingredients for an adjudication—constituting a case or controversy—were present. Compare *Interstate Commerce Comm'n v. Brimson, supra; Interstate Commerce Comm'n v. Baird,* 194 U. S. 25, 38. Judicial relief would be precisely the same as in the recognized instances of review by courts of Commission action: if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles."

The Court then concluded that the distinction earlier drawn between "negative" (and hence non-reviewable), and "affirmative" (and therefore reviewable) action of the Commission was improper, and should no longer be observed, saying (at p. 142):

> "The concept of 'negative orders' has not served to clarify the relations between administrative bodies and the courts but has rather tended to obscure them. An action before the Interstate Commerce Commission is akin to an

> inclusive equity suit in which all relevant claims are adjusted. An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction."

The essential result, in so far as concerns our immediate argument, is that the Court held that a justiciable controversy may exist between one affected by a statutory restriction, and another who, by virtue or color of his position as a public officer, has power or duty to take action under that statute, even though the latter has failed or refused to act; if the result of such non-action is to leave the affected party in its previous position of alleged disadvantage.

So, in the instant case, assuming that defendant desired to prevent plaintiff from obtaining a Federal Court adjudication of the validity of the Train-Limit Law, and in furtherance of that purpose announced, when confronted with plaintiff's complaint, that he

had not formed and would not undertake to form any opinion, or make any claim, respecting the law's validity, or the existence of any power or duty of his own as Attorney General: Could it be said that plaintiff, thus facing daily a continuing irreparable expense, which defendant's assumed conduct would be designed to perpetuate, was without any remedy other than the expedient of violation in order to provoke a possible prosecution? The *Rochester Case* provides the answer: It indicates that, just as a complainant who, being left in his prior position through non-action of a Commission, may maintain suit against that Commission to determine whether, as a matter of law, affirmative action or non-action is proper; so plaintiff herein, in the circumstances assumed, would still be entitled to maintain its suit against defendant, if thereby a determination could be had whether its unwilling observance of the restrictions should continue.

In the *Perkins Case* the essential question was whether respondent, a native of the United States, was entitled to a declaratory judgment against the Secretary of State and the Secretary of Labor, establishing her American citizenship, her right to be free of interference by the Department of Labor, and her further right to have issued to her an American passport. The lower court held (99 F. (2d) 408) that an actual controversy existed, as between respondent and the Secretary of Labor, because of respondent's claim of citizenship, and the opposing claim of alien status advanced by that defendant; but dismissed the complaint against the Secretary of

State, holding that, since the latter had discretion to issue a passport, his non-action or refusal to act could not be controlled by declaratory judgment. The Supreme Court affirmed the decree, as against the Secretary of Labor, but held that it should be modified to include also the Secretary of State; saying (307 U. S., at p. 394):

> "The cross petition of Miss Elg, upon which certiorari was granted in No. 455, is addressed to the part of the decree below which dismissed the bill of complaint as against the Secretary of State. The dismissal was upon the ground that the court would not undertake by mandamus to compel the issuance of a passport or control by means of a declaratory judgment the discretion of the Secretary of State. But the Secretary of State, according to the allegation of the bill of complaint, had refused to issue a passport to Miss Elg 'solely on the ground that she had lost her native born American citizenship.' The court below, properly recognizing the existence of an actual controversy with the defendants (*Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227), declared Miss Elg 'to be a natural born citizen of the United States' and we think that the decree should include the Secretary of State as well as the other defendants. The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship."

The decision thus squarely sustains our position that even though the matter of action or non-action by

an occupant of a public office may be subject to discretion, nevertheless if the result of non-action is to prejudice rights asserted by a private litigant, a controversy exists within the jurisdiction of the federal courts, which may be settled by a declaratory judgment. So, in the instant case, even if it were conceded that defendant could insist that he has discretion to determine whether or not he will act—i. e., state his position with respect to the validity of the law and his duties thereunder—and even further that he has exercised that discretion by declining to state his opinion, or asserting that he has none: even then, since his non-action would be intended to be, and clearly would be, highly prejudicial and damaging to plaintiff, an actual controversy would arise; and plaintiff would be entitled to a declaratory judgment whether defendant's non-action was warranted, thus necessarily determining whether the law was valid and the duty of enforcement existed.

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3. **ALTHOUGH DEFENDANT IS SUED HEREIN IN HIS INDIVIDUAL CAPACITY, AND NOT "AS ATTORNEY GENERAL", HE HAS AN ACTUAL INTEREST IN THE SUBJECT MATTER, AND IS A PROPER AND NECESSARY PARTY TO THE PRESENT CONTROVERSY.**

(Specification of Error No. 6.)

At various stages of this case in the District Court, defendant laid great stress upon the point that, since he was sued *in his individual capacity,* and not "as Attorney General", he had no legal interest in the subject matter, and therefore could not be a party to

an actual controversy with the plaintiff with respect to either the constitutionality of the Train-Limit Law, or any possible powers and duties of the Attorney General thereunder. In his opposition to plaintiff's motion to remand, the point was again strongly emphasized: Compare defendant's memorandum, at pages 9-15.

From the very first, e. g., when the motion to dismiss was filed in the District Court (R. 46), it was clear that defendant's point was wholly without merit; and in denying the motion to dismiss the District Court properly so held (R. 52). When the essential facts were more fully developed, and it was shown and admitted that defendant claimed that the official power and duty of prosecution exist, and had never stated any intention to refrain from or abandon that official duty, having in mind his oath of office, the entire basis of the argument was swept away.

This discussion is therefore not addressed to any erroneous ruling of the trial court that defendant is not and cannot be, *as an individual,* a proper party to a controversy with respect to the subject matter; for no such ruling was made. On the contrary, the trial court refused a proposed finding to that effect (Defendant's Proposed Finding No. 2; R. 97-98) tendered by defendant. Rather, we suggest that the trial court erred in failing to include an express finding that defendant has a legal interest, and is a proper and necessary party; although its Findings Nos. I and III (R. 110), which show that defendant, sued as an individual, is the Attorney General, who alone is

empowered and required to enforce the Train-Limit Law, may have been thought by the court to be adequate.

We have no doubt that defendant will renew his contention upon this appeal; and it may be expected that he will again cite the various authorities heretofore relied upon to establish the proposition that it must appear, as a prime essential to a controversy, that there are before the Court opposing parties who have an actual "legal" interest in the subject matter. Just how the contention can still be attempted, in view of the recent prosecution commenced by defendant, is a problem which will, we think, challenge the ingenuity of opposing counsel.

As we understand defendant's point, it may be stated as follows: he is sued here "as an individual"; as such "individual" he is not to be distinguished from any other citizen of Arizona; in his individual capacity he has and can have no more interest in the validity of the Train-Limit Law than any other of his fellow citizens; that (individual) interest is so remote and intangible, at best, as to be of no moment at all; "as an individual", he has no duties to perform in connection with the law or its enforcement, and is not and cannot be affected by or interested in the determination of its validity; a controversy is therefore impossible, because of the entire lack of any party, opposed to plaintiff, who has a real interest in the subject matter.

When defendant is confronted with the fact that he is, nevertheless, the Attorney General, upon whom is

laid by statute the sole duty of enforcing the challenged law; and that, acting or purporting to act in that capacity, he has prosecuted plaintiff in the State Court, defendant replies that the duty of enforcement is imposed upon him *in his official capacity,* not as an individual, and that the prosecution has been undertaken in that (official) capacity; whereas he has been and is sued, *not* "officially" or "as Attorney General", but *as an individual only.*

In short, defendant says that by suing him "as an individual", plaintiff has excluded from the case all consideration of any possible interest which he may have by reason of his "official" status; furthermore, that consideration of his official status is foreclosed, because a suit against him "as an official" would be barred by the Eleventh Amendment, as a suit against the State.

Defendant's argument would be much more persuasive if it were not so squarely opposed to the principles established by a long line of decisions of the Supreme Court; the leading case being:

Ex parte Young (1908), 209 U. S. 123, 52 L. Ed. 714.

Mr. Young, the petitioner in the Supreme Court, was at the time Attorney General of Minnesota. He had been named as defendant in a suit in a United States Circuit Court (then the court of first instance) seeking to enjoin him and certain co-defendants from enforcing a state statute challenged as unconstitutional. The Circuit Court issued a temporary injunction, despite Mr. Young's objection that he could not

be sued "as Attorney General" based on the Eleventh Amendment. Mr. Young disregarded the injunction, and was thereupon adjudged in contempt. He then petitioned the Supreme Court for writs of review and habeas corpus to obtain his discharge.

The Supreme Court, in a lengthy opinion, held that Mr. Young was not suable as an officer of the state (i. e., in his "official" capacity), because of the Eleventh Amendment; but said that the suit to enjoin enforcement of the alleged unconstitutional statute was not against the state, but *against the individual* who, under color of the office, was seeking or attempting to perform an unconstitutional act; that his occupancy of the office upon which the state had by law conferred the power and duty of prosecution under the challenged statute was sufficient to connect him with its enforcement, so as to render him a proper, if not a necessary, party to the suit. Pertinent portions of the opinion are set forth in the appendix.

In

Truax et al. v. Raich (1915), 239 U. S. 33, 60 L. Ed. 131,

suit was brought against "Wiley E. Jones, Attorney General of Arizona", and "W. G. Gilmore, County Attorney of Cochise County, Arizona", as well as against Truax, seeking to enjoin enforcement of an alleged unconstitutional law. One of the particular questions raised by defendants' motion to dismiss was whether the suit was properly brought against the Attorney General and the County Attorney. The Supreme Court said (239 U. S., at p. 37):

"As the bill is framed upon the theory that the act is unconstitutional, and that defendants, who are public officers concerned with the enforcement of the laws of the state, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the state. Whatever doubt existed in this class of cases was removed by the decision in Ex Parte Young, 209 U. S. 123, * * * which has repeatedly been followed."

In:

Terrace v. Thompson (1923), 263 U. S. 197, 68 L. Ed. 255,

suit was brought by private individuals against "Lindsay L. Thompson, Attorney General of the State of Washington", to enjoin the threatened enforcement of a state statute on the ground of unconstitutionality. The Court said (263 U. S., at p. 214):

"Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity."

In:

Pierce, as Governor, et al. v. Society of Sisters, etc. (1925), 268 U. S. 510, 69 L. Ed. 1070,

suit was brought to enjoin the threatened enforcement of the Oregon Private School Law, the defendants named being: "Walter M. Pierce, as Governor of the State of Oregon; Isaac H. Van Winkle, as Attorney General of the State of Oregon; Stanley Myers, as District Attorney of Multnomah County, State of Oregon." Following its rulings in the *Truax* and *Terrace Cases,* supra, and in numerous others, the Court held that the suit was properly brought and might properly be maintained.

Compare:

Old Colony Trust Co. v. Seattle (1926), 271 U. S. 426, 70 L. Ed. 1019,

in which suit was brought against the individuals occupying the offices of County Treasurer and County Sheriff of King County, Washington. The objection was made that the suit was in both name and effect a suit against the state; but the Court held (271 U. S., p. 431) that this was "only a suit against state agents to restrain them from wrongful acts threatened and attempted under color of their agency"; and that the immunity conferred by the Eleventh Amendment did not avail.

To the same effect, see also:

Missouri Pacific R. Co. v. Norwood (1930), 42 F. (2d) 765,

in which suit was brought against Hal Norwood, Attorney General of the State of Arkansas, and certain

other prosecuting officers of that state, to enjoin the enforcement of the Arkansas Full Crew Law. The Court overruled the defendants' contention that the suit was against the state, citing the *Old Colony,* and *Young Cases,* among others. This case was subsequently appealed to the United States Supreme Court, and the decision of the lower court affirmed (1931: 283 U. S. 249), though without any discussion of the matter of jurisdiction. It is clear, however, that jurisdiction was not thought lacking because of the absence of proper parties to a justiciable controversy.

In:

Municipal Gas Co. v. Public Service Commission (1919), 225 N. Y. 89, 121 N. E. 772,

(opinion written by Mr. Justice Cardozo, as a member of the New York Court of Appeals), the principle of the *Young Case* was examined and applied; the court saying:

> "*The defendants are public officers charged with special duties in the enforcement of the statute.* Ex parte Young, 209 U. S. 123, 156, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. *They assert a purpose to enforce it.* With them may appropriately be joined representatives of the class of consumers, who will be bound by the decree. Code Civ. Proc. Sec. 448. In a single comprehensive action, the plaintiff seeks a judgment which will end the controversy forever.
>
> "We think the suit is well conceived. With notable consistency, it has been held, whenever like controversies have arisen, that equity will

act. * * * Many of the most distinctive features of equity jurisdiction are present. * * * There is the avoidance of multiplicity of actions. There is the saving of waste and friction. There is the opportunity to analyze accounts so complex and vast as to be unintelligible to juries. * * * There is a protection against penalties that crush and against losses that cripple. Stress has been laid at times upon one element and at other times upon another. But resistance has yielded to their collective force.

"We reach the same conclusion. Undoubtedly, the plaintiff has some remedy at law. The decisive point is that it is not as complete or efficient as the remedy in equity. * * * This is no attempt by equity to restrain the enforcement of the criminal law, even if we were to assume that such an objection would invariably be fatal. * * * *The very purpose of the suit is a declaration of the plaintiff's rights which will enable it to shape its conduct in conformity to law.*" (Emphasis supplied.)

The principle established by this line of decisions disposes of defendant's argument completely; for, to paraphrase the language of the *Young opinion,* the fact that defendant by virtue of his office is directly connected with—indeed, has sole responsibility for—the enforcement of the challenged act is the important and material fact; and the power conferred upon him by the state to enforce the act (if the act be constitutional) sufficiently connects him with the duty of enforcement to make him a proper party to a suit against him *as an individual* (although identified, as here, as the Attorney General) to enjoin such enforcement.

It may be noted that in each of the cases last above cited, suit was brought against an individual or group of individuals occupying state positions, frequently having the same title as defendant. In most of these cases the defendants were identified by both their personal names and their official titles; in some they were even named *"as* Attorney General". In each case, however, the defendants were of necessity sued "as individuals"; they could not have been made defendants in their official capacities. In the *Truax, Old Colony,* and *Norwood Cases,* particularly, the courts pointed out, in response to defendants' objections, that the suits were not against the states, *but against the individuals,* acting under color of their respective state offices.

It is clear, from these cases, that if defendant had said to the plaintiff that *as Attorney General* he intended to and would enforce the Train-Limit Law against plaintiff in the event of violation, bringing such proceedings in his official capacity (of course he could not attempt to bring them in any other capacity), plaintiff would then be in a position to sue the defendant *as an individual,* seeking to enjoin such threatened prosecution, upon the ground that defendant intended and threatened to enforce an unconstitutional statute. In such case the defendant, as an individual, but because of his occupancy of the office charged with enforcement of the challenged law, would be a proper and necessary party; and there would be an actual controversy as to whether the power and duty of enforcement could be exercised as threatened.

No question could arise as to the fact of controversy, even though the suit were against defendant in his *individual,* and not his "official", capacity. In fact, in the light of the Eleventh Amendment, the suit could be maintained only as against the individual, but that restriction would not abate the controversy. The decisions above cited are conclusive.

Defendant, while he cannot avoid the force of the decisions of which the *Young Case* is typical, argues that each of them involved proceedings *for an injunction,* predicated on an actual threat to enforce a law asserted to be unconstitutional; whereas the instant complaint asks for only a *declaratory* judgment—not an injunction—and no actual threat is either alleged or shown. In other words, so says defendant, the essentials of a controversy, in a suit for a declaratory judgment, and particularly the essential that there be parties who have actual adversary interests in the subject matter, are not the same as in a suit for an injunction; and the authorities which establish that a state officer who is alleged to have threatened to prosecute may be and is a proper party, *as an individual,* to an actual controversy *in an injunction suit,* are of no value to support the proposition that a state officer who is shown to have claimed the right and duty of prosecution (but has not actually threatened to exercise it) is equally a proper party, *as an individual,* to an actual controversy *in a suit for declaratory relief.*

The fallacy of this argument is easily demonstrated. Suppose that plaintiff, being faced with a statement by defendant of his intention to enforce the law,

brings suit as before, against him as an individual, alleging the same facts: i. e., the unconstitutionality of the law and the threat of enforcement; but instead of asking for an injunction to prevent the threatened prosecution, it asks for a declaratory decree that the law is unconstitutional and that the threatened power of enforcement does not exist. Certainly, in those circumstances, there would be no lack of parties having an actual interest, giving rise to a justiciable controversy: for the same parties would be before the court, in the same adversary positions, as if the suit were for an injunction. The only difference would be that the plaintiff, instead of seeking the so-called "coercive" relief which, if granted, would require the issuance of process, had sought instead of the "milder" relief of a judicial declaration of the rights and powers of the parties. That determination and declaration would be necessary in any event, before an injunction could issue: for as pointed out in the *Municipal Gas Company Case,* supra:

> "The very purpose of the suit is a *declaration* of the plaintiff's rights which will enable it to shape its conduct in conformity to law."

In other words, the difference between a suit for an injunction, based upon threats of enforcement, and a suit for a declaratory judgment, similarly based, lies merely in the remedy sought, and not in any of the aspects of the case upon which the existence of a controversy is determined. In seeking to avail itself of the judicial power to render a declaratory judgment, a plaintiff merely takes advantage of a slightly

different *method of procedure,* to determine exactly the same basic controversy, the existence of which, if an injunction had been sought, could not have been questioned in the light of the controlling decisions.

That the essentials of a controversy are not changed, merely because declaratory rather than injunctive relief is sought, is squarely established by the *Wallace* and *Haworth Cases*, already cited, and also by:

United States v. West Virginia (1935), 295 U. S. 463 (475), 79 L. ed. 1546.

In the *Wallace Case* the Court stated the jurisdictional question before it (288 U. S., at p. 262):

> "Thus the narrow question presented for determination is whether the controversy before us, *which would be justiciable in this Court if presented in a suit for injunction, is any the less so because through a modified procedure appellant has been permitted to present it* in the state courts, *without praying for an injunction* or alleging that irreparable injury will result from the collection of the tax."

The Court answered that question *in the negative,* by saying (at p. 264):

> "The issues raised here are the same as those which under old forms of procedure could be raised only in a suit for an injunction or one to recover the tax after its payment. *But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular*

method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. * * * As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial." (Emphasis supplied.)

In the *Haworth Case,* it was said, with particular reference to the very statute under which the instant case is presented (300 U. S., at pp. 239-241):

"The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. *Thus the operation of the Declaratory Judgment Act is procedural only.* In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. (Citing cases.) Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. * * *

"* * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an ad-

> versary proceeding upon the facts alleged, *the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.* (Citing cases.) *And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required.*" (Emphasis supplied.)

In the *West Virginia Case* the Court said (295 U. S., at p. 475):

> "It is enough that that (Federal Declaratory Judgment) act is applicable only 'in cases of actual controversy'. *It does not purport to alter the character of the controversies* which are the subject of the judicial power under the Constitution." (Emphasis supplied.)

These decisions leave no doubt that if a justiciable controversy exists between a private citizen, such as plaintiff, on the one hand, and, on the other, an individual such as defendant who is clothed by the State with authority to enforce its laws, in a case where an injunction is sought, such a controversy continues to exist and a federal court has jurisdiction thereof, in a case in which the substituted procedure provided by the Declaratory Judgments Act is followed, and declaratory relief is asked for, rather than the so-called coercive relief of injunction. The essentials of a controversy remain the same; the essential and necessary parties thereto are not changed; and if a state officer sued in his individual capacity is a proper and necessary party to an injunction suit, he continues

to be a proper and necessary party when the altered procedure leading to declaratory relief is followed.

This, we believe, is precisely the essence of the Supreme Court decisions just cited. The point is well illustrated by the opinion of the Fifth Circuit Court of Appeals in:

Gully v. Interstate Natural Gas Co., supra,

in which it was said (82 F. (2d) 145, 149):

> "When, then, an actual controversy exists, of which, if coercive relief could be granted in it the federal courts would have jurisdiction, they may take jurisdiction under this statute, of the controversy to grant the relief of declaration, either before or after the stage of relief by coercion has been reached."

It may be noted that in the *Gully Case* the complainant had originally sought an injunction against certain state officers; but a supplementary complaint asking for declaratory relief was later filed. The Circuit Court of Appeals held that the trial court had properly taken jurisdiction of both the original complaint for an injunction, and the supplementary complaint for declaratory relief. The Supreme Court later denied a writ of review; and the Circuit Court's decision was cited with apparent approval in the opinion in the *Haworth Case:* 300 U. S., at p. 244.

Compare also, the recent decision in:

Sovereign Camp v. Wilentz, supra,

in which the complaint as filed named as defendants the Attorney General of New Jersey and certain other state officials. The complaint was in four counts, the

first three of which asked for injunctive relief, while the fourth asked for both declaratory and injunctive relief. The Court took jurisdiction of all four counts, holding that an actual controversy existed under the facts stated in the fourth count, as well as in the other three.

We have thus far discussed the question of defendant's actual interest, and consequent competency as a party to the controversy, upon the basis of the record in the trial court, without reference to the facts brought before this Court by plaintiff's motion to remand and defendant's response thereto: i. e., the prosecution of plaintiff in the state court, based on alleged violations of the Train-Limit Law; and defendant's contemporaneous public announcement of his belief in the validity of the law, and thus in the legal existence of the right and duty of prosecution. If there were any possible doubt of defendant's actual interest in the subject matter, these events should set it completely at rest: defendant is now in exactly the same position as were the various state officers in the several cases cited above, of which *Ex parte Young* is the leading example.

Defendant meets the present situation, however, by continuing to contend, as we understand him, that his action in the state court is *officially* undertaken, whereas he comes to the Federal Courts, if at all, only "as an individual"; that his official acts are entirely distinct from his individual acts, and have no

bearing whatever upon his individual position, nor any materiality in this suit against him "in his individual capacity".

It will be apparent at once that defendant's contention both supplies whatever elements of controversy may hitherto have been lacking, even accepting his own previous argument, and at the same time provides a ready-made answer to that controversy. Of necessity defendant can contend that the state court prosecution is an "official" act, only if he also contends that the law authorizing such prosecutions is constitutional. If it is unconstitutional, then under all the decisions his action, though under color of his office, is still not the official act of a state officer, but merely of an individual acting in the guise of the state office. The primary question in controversy is precisely whether defendant can "officially" exercise the power of prosecution; so that by asserting his official status defendant really begs the very question in suit.

It may be, however, that defendant, in order to maintain his position that no controversy here exists, will continue to assert that, "as an individual", he admits that the law is invalid. If so, there is still no lack of controversy; for then there will admittedly be before the Court two parties: (1) plaintiff, asserting that it is constitutionally protected against prosecution for operating "long" trains, and (2) defendant, asserting the right, and endeavoring, to maintain and carry on such prosecution. Moreover, defendant will then be admittedly acting in an individual capacity,

precisely the capacity in which he is sued in this Court; because if he admits unconstitutionality of the law, he thereby admits that in his conduct of the state prosecutions he cannot be acting officially.

Thus, whichever position defendant adopts, his action in having prosecuted plaintiff in the state court cannot be dissociated from his presence in the federal court; but, on the contrary, when taken with all other matters of record, establishes that an actual controversy, between competent parties, exists and has existed herein from the time that the suit was commenced.

4. IN THE EVENT THE COURT IS NOT PERSUADED TO REVERSE THE DECREE UPON THE BASIS OF THE RECORD BEFORE IT, THE CAUSE SHOULD BE REMANDED FOR FURTHER PROCEEDINGS, AS PROPOSED BY PLAINTIFF'S MOTION TO REMAND, HERETOFORE FILED.

In response to the suggestion of this court, in its order herein on June 19, 1940, plaintiff now renews its motion to remand the cause for the purpose of permitting a supplemental complaint to be filed and a supplemental showing made, relating to events which have taken place since the appeal to this Court was perfected. The events to which we refer are, as heretofore shown in support of the motion, the commencement of prosecutions under the Train-Limit Law, undertaken by defendant as Attorney General, on April 19, 1940, and an accompanying announcement, made by defendant on the same date, to the effect that he believed the Train-Limit Law to be valid and that power and duty to prosecute for each violation were vested in him.

The motion is presented in the alternative; i. e., to be granted only if this Court is not disposed to reverse the judgment on the record as made, or to give consideration at this time to said subsequent events in deciding this appeal.

In the memorandum heretofore filed supporting the motion, we have cited numerous authorities which establish that the remand of a cause for supplementary proceedings, when appeal has been taken, is the proper course to be followed in those cases where events have taken place since the trial court record was closed and the appeal taken, which have material bearing upon the determination of the cause and might, if of record, lead to a wholly different result. The leading case declaring this principle is:

Ballard v. Searls (1889), 130 U. S. 50, 32 L. Ed. 846.

Other cases supporting the same view include:

Drainage District No. 7 v. Sternberg (C.C.A. 8th, 1926), 15 F. (2d) 41 (44-45);

Jensen v. New York Life Ins. Co. (C.C.A. 8th, 1931), 50 F. (2d) 512 (514-515);

Simonds v. Norwich Union Indemnity Co. (C.C.A. 8th, 1934), 73 F. (2d) 412;

Central California Canneries Co. v. Dunkley Co. (C.C.A. 9th, 1922), 282 Fed. 406 (412);

Levinson v. United States (C.C.A. 6th, 1929), 32 F. (2d) 449 (450);

Isgrig v. United States (C.C.A. 4th, 1939), 109 F. (2d) 131.

These and other authorities declare that supplementary proceedings, such as plaintiff proposes, are proper when it appears that they tend to confirm a good cause of action originally pleaded.

Jenkins v. International Bank (1888), 127 U. S. 484 (488-489), 32 L. ed. 189;

Texarkana v. Arkansas Gas Co. (1939), 306 U. S. 188 (203); 83 L. ed. 598;

Napier v. Westerhoff (1907), 153 Fed. 985;

Kryptok Co. v. Haussmann & Co. (1914), 216 Fed. 267;

Insurance Finance Corp. v. Phoenix Securities Corp. (1929), 32 F. (2d) 711, 712;

International Ry. Co. v. Prendergast (1928), 29 F. (2d) 296, 298.

The filing of a supplemental pleading setting forth transactions, occurrences or events which have happened since the date of the pleading sought to be supplemented, is of course authorized by Rule 15(d) of the Federal Rules of Civil Procedure. In the recent *Texarkana Case,* cited supra, the Supreme Court referred to that rule, and said (306 U. S., at p. 203):

> "Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justify other or further relief is proper."

It is hardly open to question that the complaint in the instant case does set up a good cause of action. The record shows (R. 46) that defendant filed a motion to dismiss for failure to state a good cause of

action, which motion was overruled by the trial court (R. 52); and defendant thereafter elected to answer and go to trial. The adverse judgment against plaintiff was not rendered because of any failure to set forth a sufficient cause of action, but solely because plaintiff did not establish, to the satisfaction of the trial court, the fact of an actual and substantial dispute between the parties with respect to the subject matter.

In particular, the Federal Courts have often held that where a cause has been tried and determined, as this case has, upon the substantive issues, but there appears a failure of proof of essential *jurisdictional* facts, the cause will not be dismissed, but remanded to the trial court to permit necessary supplementary proceedings, such as the filing of an amended or supplemental pleading with respect to such jurisdictional facts; which issue of jurisdiction may then be tried.

Parker Washington Co. v. Cramer (C.C.A. 7th, 1912), 201 Fed. 878, 879;

Chicago, Rock Island & Pacific Ry. Co. v. Stevens (C.C.A. 6th, 1914), 218 Fed. 535, 540-541;

Chicago & A. R. Co. v. Allen (C.C.A. 7th, 1917), 249 Fed. 280, 284-285;

Ward v. Morrow (C.C.A. 8th, 1926), 15 F. (2d) 660, 662-663;

Coppedge v. Clinton (C.C.A. 10th, 1934), 72 F. (2d) 531, 536.

Defendant does not challenge or deny plaintiff's showing of the subsequent facts. He shows, however,

that, at his instance, the state court issued an order staying all prosecutions of plaintiff for alleged train-limit violations, except the prosecution just commenced, until the latter be determined. That stay order does not of course prevent the irreparable damage to plaintiff caused by daily compliance with the law.

Defendant has opposed our motion on four grounds:

(1) That the supplementary showing is immaterial, and in reality an attempt to set up a new cause of action;

(2) That such showing does not and cannot cure the want of jurisdiction allegedly existing when the complaint was filed;

(3) That such showing affirmatively indicates that the amount in controversy is less than $3,000.00, and that jurisdiction is therefore lacking; and

(4) That defendant, sued as an individual, has and can have no interest sufficient to make him a party to a controversy with plaintiff respecting the Train-Limit Law, and therefore the remand of the cause would be useless.

Defendant predicates his first point upon his position that this suit is against him in his "individual" capacity; whereas the state court prosecution has been undertaken, and the public statement issued, so it is said, in his "official" capacity. This general contention has been discussed in the last preceding subdivision, and need not be further reviewed. It is sufficient to say again that the ultimate question in the

case is whether defendant *can* act "officially"—i. e., within constitutional limits—in prosecuting plaintiff or threatening it with prosecutions for penalties under the challenged law; and when defendant contends that he is so acting, he demonstrates the existence of an actual controversy with plaintiff, as to whether the claimed "official" action has due and legal sanction under the Constitution.

The argument that the proposed showing attempts to set up a new cause of action misses the point entirely. Plaintiff is not proposing to sue defendant anew, because of these subsequent acts, but only to employ them as conclusive evidence to support its position as stated throughout this suit: namely, that from the beginning the parties have maintained opposing claims respecting a subject matter in which defendant, by virtue of his office, has a direct legal interest (*Ex parte Young,* supra).

In arguing that the supplementary matters can not cure the want of jurisdiction allegedly existing when the case was commenced, defendant really addresses himself to the weight, rather than the pertinency, of the proposed showing. We repeat that jurisdiction was found lacking in this cause for one reason only: that the record failed, in the view of the trial court, to show sufficiently that the parties actually maintained opposing views. The question now is whether these subsequent facts, when considered together with all other facts of record reflecting defendant's claims and opinions, overcome that supposed failure of proof. That question is essentially for the trial court to de-

termine; this Court need only consider whether the showing will reasonably tend to that end. Compare:

Ballard v. Searls, supra;

Jensen v. New York Life Ins. Co., supra;

Central California Canneries Co. v. Dunkley Co., supra.

In the *Central California Canneries Co. Case* this Court said (282 Fed., at p. 412):

> "Regarding the defendant's petition for review as in effect an application for leave to the lower court to entertain a petition for a rehearing (Simmons Co. v. B. S. Grier Bros. Co., supra), we are of the opinion that the defendants should be authorized to file in the lower court an appropriate petition for a rehearing, and that court should be authorized to entertain and make disposition of the same, according to equity, upon considerations addressed to the materiality of the new matter and diligence in its presentation, without restraint by reason of any proceedings heretofore had or orders made in this court; and it is so ordered."

Circuit Judge Hunt, concurring in the opinion of the Court, said further:

> "While I believe the appellate court in the exercise of a discretion has the power to decide that the bill, which is in the nature of a bill of review or motion for rehearing upon the ground of newly discovered evidence, may be filed, yet it is proper practice for such court to go no further than to hold that a sufficient showing is made to warrant it in granting to petitioner permission to apply to the District Court for leave to file the bill or motion (citing cases)."

The materiality and probative value of the supplementary showing, while not open to serious question, may be demonstrated, if we assume a prosecution commenced prior to the trial instead of afterward. Suppose, for illustration, that the cause had progressed up to and including the pre-trial conference, exactly as shown by the record; and that plaintiff, following that conference, and relying upon defendant's admissions of unconstitutionality, had at once commenced operating long trains; that defendant, acting "officially", had thereupon immediately initiated prosecutions in the state court, also at the same time making a public announcement of his beliefs, such as actually made on April 19, 1940. There would be no doubt, if the trial were held thereafter, that these matters would be competent and material evidence upon the question of "actual controversy"; and we think it equally clear that the same matters are just as material, and just as properly to be shown, although occurring after, instead of before, the trial and entry of decree in the lower court.

In his opposition, defendant lays great stress upon the decision in:

M. & St. L. R. R. Co. v. P. & P. Union Ry. Co. (1926), 270 U. S. 580, 70 L. Ed. 743.

In that case the Supreme Court denied a motion to remand for the purpose of showing subsequent facts, upon the ground that "the later facts alleged could not conceivably affect the result of the case before us", saying also that jurisdiction was dependent upon the state of facts existing at the time the suit was brought.

The case is clearly of little assistance to defendant; for the later facts here set forth do not merely show the existence of a controversy *as of the date of the commencement of the prosecution;* they tend strongly to confirm plaintiff's contention that defendant has *always* claimed to have the power and duty of prosecution, and *always* intended to exercise that power, if occasion arose. We are here necessarily dealing with proof addressed to a "state of mind", viewed in the light of defendant's statutory obligation, and as evidenced by his acts or declarations. The Court of Civil Appeals of Texas said in:

> *Shaw v. Cone* (1933), 56 S. W. (2d) 667 (at p. 671):
>
> "The generally recognized rule is that, where the issue is a state of mind with which a person acts, both parties should be allowed a wide field in proving the general course of the person's conduct under investigation, with each detail and ramification which might tend to color the conduct or characterize the intent which actuated it. U. S. Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co. (C. C. A. 8th, 1906) 148 F. 353; Massillon Mortgage Co. v. Independent Indemnity Co. (1930) 37 Ohio App. 148, 174 N. E. 167."

Defendant supports his third point—that the supplementary showing will demonstrate that the amount in controversy is less than $3000.00—by arguing that the action in the state court involves only two alleged violations, so that the total penalties imposed upon plaintiff therein could not exceed $2000.00. Reference

is also made to defendant's sworn statement that he will not institute any further prosecutions under the law, and to the stay order issued by the state court restraining any such further prosecutions. In this behalf defendant cites certain decisions of the Supreme Court which hold, generally, that when suit is brought to restrain the collection of taxes or license fees, the amount in controversy is measured by the amount of the taxes in dispute; and in such cases taxes or other fees which might be due in other years, or for other operations, cannot be considered.

The most recent of the cases cited by defendant is *Healy v. Ratta* (1934), 292 U. S. 263, 78 L. Ed. 1248. That case was brought to restrain local officers from enforcing an ordinance, imposing local licenses on door-to-door salesmen. It did not appear that the statute prohibited the activities of such salesmen, but only that the license fee was deemed to be excessive. The case is clearly not in point here, and indeed defendant's entire argument is wholly without merit, because:

(a) The instant suit was not brought to restrain defendant from collecting any fees or licenses from plaintiff, exacted for the privilege of doing business, or to restrain defendant from prosecuting plaintiff for conducting business without first securing a license. The purpose of this suit is to obtain a decree establishing the invalidity of a statute which commands a direct restriction of plaintiff's business, without reference to the payment of a tax or penalty. The statute is mandatory in its prohibition, not permissive;

it does not authorize or license plaintiff to operate long trains in consideration of a tax or fee.

(b) In a suit involving the invalidity of a restrictive statute such as the Train-Limit Law, the right to carry on the business free of the restriction, or the injury done to the business by operation of the restriction, is the matter in controversy; and the value of the right or injury is the measure of the value or amount in controversy. In:

Healy v. Ratta, supra,

the Court said (292 U. S., at p. 269):

> "Where a challenged statute commands the suppression or restriction of a business without reference to the payment of any tax, the right to do the business, or the injury to it, is the matter in controversy."

See also:

Bitterman v. L. & N. R. R. Co. (1907), 207 U. S. 205 (225), 52 L. Ed. 171;

Glenwood L. & W. Co. v. Mutual Light, etc., Co. (1915), 239 U. S. 121 (125, 126), 60 L. Ed. 174;

Western & Atlantic R. R. v. Railroad Commission (1923), 261 U. S. 264 (267), 67 L. Ed. 645;

Adam v. New York Trust Co. (1930), 37 F. (2d) 826.

(b) It is alleged (complaint, pars. II-b, V-h, VI-c: R. 4, 19-20, 23-24), admitted (R. 82-84), and found (R. 113, 114) that the value of the right sought to be established, i. e., the plaintiff's constitutional right to

operate its properties free of the restrictions of the Law, and the value or amount of the injury done to plaintiff by reason of the law's limitations, is greatly in excess of $3000.00, and in fact in excess of $300,000.00 per year.

Defendant's fourth point—his alleged lack of interest, as an individual, in the subject matter of the suit, and his consequent inability to be an effective party in that capacity to a justiciable controversy—has already been reviewed at length. We may point out again that this contention has been strongly pressed—has in fact been defendant's principal argument—from the very beginning of the case. It is predicated, as we have shown, upon the proposition, persistently advanced, that defendant *as an individual* is wholly distinct from defendant *as the Attorney General,* and that whatever may be done or said by him in either capacity has no bearing upon or relation to what he may say or do in the other. While the fallacy of this argument is obvious, yet its significance should not be overlooked. It demonstrates that defendant's action in prosecuting the plaintiff as soon as the occasion arose was only the culmination of a determination long since arrived at—probably when defendant first took his oath of office; but since that determination was, in defendant's view, "officially" made, it did not in his opinion bear any relation to his position *as an individual;* and when sued in the latter capacity, he could still, and did, disclaim any interest, and even *as an individual* admit that the law was and is invalid.

We respectfully urge the Court, in the event it concludes that upon the record as made, or consideration as well of the subsequent matters now placed before it by plaintiff's motion and defendant's response, that it is unwilling to reverse the judgment, to remand the cause to the trial court, with directions to permit plaintiff to file a supplemental complaint and make a supplementary showing, all as contemplated by plaintiff's original motion.

CONCLUSION.

This case presents an unusual, though not unprecedented situation.

There are before the Court, on the one hand, a plaintiff suffering the oppression of an admittedly void statute, which imposes heavy and continuing irreparable damage; on the other, a defendant who, though admitting his official connection with and sole responsibility for the enforcement of the void statute, denies that as the individual who occupies such office he has any interest in the statute or its enforcement. On that ground alone, and because he was sued "as an individual", defendant claims that no controversy exists with respect to his purported power and duty of prosecution; this, even though he has actually prosecuted plaintiff "officially", at once when the occasion arose, and now continues to maintain that prosecution.

The case clearly calls for a judgment which will expose and condemn the fallacious pretense upon which defendant rests his case.

The record in the lower court is in our view complete; no further trial is required. All that is needed is that the judgment be reversed with directions to the trial court to make and render a finding and conclusion to the effect that an actual controversy is established. Judgment and decree in plaintiff's favor will then follow as of course, based upon the other findings of fact already made.

However, if this Court should feel that a finding of the existence of a controversy will be strengthened or further supported by evidence of the overt acts, which evidence would be fully admissible had such acts been committed on the eve of trial, then we ask that the case be remanded for appropriate pleading and proof.

Dated, San Francisco, California,
July 11, 1940.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

The Federal Declaratory Judgments Act (28 U. S. Code 400):

"Sec. 400. (Judicial Code section 274d.) Declaratory judgments authorized; procedure:

(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (Mar. 3, 1911, c. 231, Sec. 274d, as added June 14, 1934, c.

512, 48 Stat. 955; as amended Aug. 30, 1935, c. 829, Sec. 405, 49 Stat. 1027.)"

The Arizona Train-Limit Law (Arizona Revised Statutes, 1928, Sec. 647):

"Section 1. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the state of Arizona, to run, or permit to be run, over his, their, or its line of road, or any portion thereof, any train consisting of more than seventy freight, or other cars, exclusive of caboose.

"Section 2. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the state of Arizona, to run, or permit to be run, over his, their, or its line of road, or any portion thereof, any passenger train consisting of more than fourteen cars.

"Section 3. Any person, firm, association, company or corporation, operating any railroad in the state of Arizona, who shall wilfully violate any of the provisions of this act, shall be liable to the state of Arizona for a penalty of not less than one hundred dollars, nor more than one thousand dollars, for each offense; and such penalty shall be recovered, and suits therefore brought by the attorney general, or under his direction, in the name of the state of Arizona, in any county through which such railroad may be run or operated, provided, however, that this act shall not apply in cases of engine failures between terminals.

"Section 4. All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

EXCERPTS FROM OPINIONS IN CASES CITED IN THE ARGUMENT.

Aetna Life Ins. Co. v. Haworth (C. C. A., 8th, 1936), 84 F. (2d) 695 (at p. 697):

"It will be noted from an examination of the statement served upon plaintiff that *no suit is threatened and no demand made by the defendants. The defendants simply assert* that the policies are in force and effect. The apprehension of the plaintiff is that suit will be brought against it at some time prior to the running of the statute of limitations.

"We are impressed that the situation thus presented by the petition amounts to no more than an 'assumed potential invasion' of plaintiff's rights, and that it does not for this reason present a justiciable controversy. State of Arizona v. California, 283 U. S. 423, 462, 51 S. Ct. 522, 75 L. Ed. 1154. The judicial power of the federal courts does not extend to the giving of mere advisory opinions or the determination of abstract propositions. State of Alabama v. Arizona, 291 U. S. 286, 291, 54 S. Ct. 399, 78 L. Ed. 798; United States v. West Virginia, 295 U. S. 463, 474, 55 S. Ct. 789, 79 L. Ed. 1546; State of New Jersey v. Sargent, 269 U. S. 328, 338, 46 S. Ct. 122, 125, 70 L. Ed. 289. To present an 'actual controversy' within the constitutional meaning of that phrase *there must be a statement of facts showing that the defendant is acting or is threatening to act in such a way as to invade, or prejudicially affect, the rights of the plaintiff.* The Declaratory Judgment Act does not change the essential requisites for the exercise of judicial power nor alter the character of controversies which are the subject of judicial

power under the Constitution. Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 325, 56 S. Ct. 466, 472, 80 L. Ed. .....; United States v. West Virginia, 295 U. S. 463, 475, 55 S. Ct. 789, 79 L. Ed. 1546." (Emphasis supplied.)

Aetna Life Ins. Co. v. Haworth (1937), 300 U. S. 227 (at pp. 239-241, 242-244), 81 L. Ed. 617:

"The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

"A 'controversy' in this sense must be one that is appropriate for judicial determination. *Osborn v. United States Bank,* 9 Wheat. 738, 819. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. *United States v. Alaska S. S. Co.,* 253 U. S. 113, 116. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *South Spring Gold Co. v. Amador Gold Co.,* 145 U. S. 300, 301; *Fairchild v. Hughes,* 258 U. S. 126, 129; *Massachusetts v. Mellon,* 262 U. S. 447, 487, 488. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. See *Muskrat v. United States, supra; Texas v. Interstate Commerce Comm'n,* 258 U. S. 158, 162; *New Jersey v. Sargent,* 269 U. S. 328,

339, 340; *Liberty Warehouse Co. v. Grannis,* 273 U. S. 70; *New York v. Illinois,* 274 U. S. 488, 490; *Willing v. Chicago Auditorium Assn.,* 277 U. S. 274, 289, 290; *Arizona v. California,* 283 U. S. 423, 463, 464; *Alabama v. Arizona,* 291 U. S. 286, 291; *United States v. West Virginia,* 295 U. S. 463, 474, 475; *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 324. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. *Nashville, C. & St. L. Ry. Co. v. Wallace, supra,* p. 263; *Tutun v. United States,* 270 U. S. 568, 576, 577; *Fidelity National Bank v. Swope,* 274 U. S. 123, 132; *Old Colony Trust Co. v. Commissioner, supra,* p. 725. *And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required. Nashville, C. & St. L. Ry. Co. v. Wallace,* supra, p. 264." * * *

"There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract. Prior to this suit, the parties had taken adverse positions with respect to the disability benefits which were to be payable upon prescribed conditions. On the one side, the insured claimed that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums and was en-

titled to the stipulated disability benefits and to the continuance of the policies in force. The insured presented this claim formally, as required by the policies. It was a claim of a present, specific right. On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment of premiums, that in consequence the policies had lapsed, and that the company was thus freed from its obligation either to pay disability benefits or to continue the insurance in force. Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication or present right upon established facts.

* * * * * * *

"If the insured had brought suit to recover the disability benefits currently payable under two of the policies there would have been no question that the controversy was of a justiciable nature, whether or not the amount involved would have permitted its determination in a federal court. Again, on repudiation by the insurer of liability in such a case and insistence by the insured that the repudiation was unjustified because of his disability, the insured would have 'such an interest in the preservation of the contracts that he might maintain a suit in equity to declare them still in being.' (Citing cases.) But the character of the controversy and of the isue to be determined is essentially the same whether it is presented by the insured or by the insurer. Whether the District Court may entertain such a suit by the insurer, when the controversy as here is between citizens

of different States or otherwise is within the range of the federal judicial power, is for the Congress to determine. It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative. See *Gully v. Interstate Natural Gas Co.,* 82 F. (2d) 145, 149; *Travelers Insurance Co. v. Helmer,* 15 F. Supp. 355, 356; *New York Life Insurance Co. v. London,* 15 F. Supp. 586, 589." (Emphasis supplied.)

Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace (1933), 288 U. S. 249 (at pp. 261-262), 77 L. Ed. 730:

"That the issues thus raised and judicially determined would constitute a case or controversy if raised and decided in a suit brought by the taxpayer to enjoin collection of the tax cannot be questioned. See *Risty v. Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378; compare *Terrace v. Thompson,* 263 U. S. 197; *Pierce v. Society of Sisters,* 268 U. S. 510; *Euclid v. Ambler Realty Co.,* 272 U. S. 365. The proceeding terminating in the decree below, unlike that in *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.,* 145 U. S. 300; *Muskrat v. United States,* 219 U. S. 346, was between adverse parties, seeking a determination of their legal rights upon the facts alleged in the bill and admitted by the demurrer. Unlike *Fairchild v. Hughes,* 258 U. S. 126; *Texas v. Interstate Commerce Commission,* 258 U. S. 158; *Massachusetts v. Mellon,* 262 U. S. 447; *New Jersey v. Sargent,* 269 U. S. 328, valuable legal rights asserted by the complainant and threatened with imminent invasion by appellees, will be directly affected to a specific and substantial degree

by the decision of the question of law; and unlike *Luther v. Borden,* 7 How. 1; *Field v. Clark,* 143 U. S. 649; *Pacific States Telephone & Telegraph Co. v. Oregon,* 223 U. S. 118; *Keller v. Potomac Electric Power Co.,* 261 U. S. 428; *Federal Radio Commission v. General Electric Co.,* 281 U. S. 464, the question lends itself to judicial determination and is of the kind which this Court traditionally decides. The relief sought is a definitive adjudication of the disputed constitutional right of the appellant, in the circumstances alleged, to be free from the tax, see *Old Colony Trust Co. v. Commissioner,* 279 U. S. 716, 724; and that adjudication is not, as in *Gordon v. United States,* 2 Wall. 561, and *Postum Cereal Co. v. California Fig Nut Co.,* 272 U. S. 693, subject to revision by some other and more authoritative agency. Obviously the appellant, whose duty to pay the tax will be determined by the decision of this case, is not attempting to secure an abstract determination by the Court of the validity of a statute, compare *Muskrat v. United States, supra,* 361; *Texas v. Interstate Commerce Commission, supra,* 162; or a decision advising what the law would be on an uncertain or hypothetical state of facts, as was thought to be the case in *Liberty Warehouse Co. v. Grannis,* 273 U. S. 70, and *Willing v. Chicago Auditorium Assn.,* 277 U. S. 274; see also *Warehouse Co. v. Tobacco Growers Assn.,* 276 U. S. 71, 88; compare *Arizona v. California,* 283 U. S. 423, 463."

Gully v. Interstate Natural Gas Co. (1936), 82 F. (2d) 145 (149) (cited with approval by the Supreme Court in the *Haworth Case,* 300 U. S., at p. 244):

"When, then, an actual controversy exists, of which, if coercive relief could be granted in it the federal courts would have jurisdiction, they may take jurisdiction under this statute, of the controversy to grant the relief of declaration, *either before or after the stage of relief by coercion has been reached.* (Citing cases.) * * *

"We see no reason why the statute should not, we think it should, be given the prophylactic scope to which its language, in the light of its purpose, extends, under which disputants as to whose rights there is actual controversy, may obtain a binding judicial declaration as to them, before damage has actually been suffered, and *without having to make the showing of irreparable injury and the law's inadequacy* required for the granting of ordinary preventive relief in equity. Though before the enactment of statutes of this kind declaratory relief was not of a general wideness, it is neither new nor strange in character. It has been granted numbers of times in construing instruments to give directions to trustees and others obliged to carry out written but doubtful directions. The purpose of the statute is, we think, wise and beneficial. It will, if applied in accordance with its terms, effect a profound, a far-reaching, a greatly to be desired procedural reform. We see no sound reason for limiting it." (Emphasis supplied.)

Edelmann v. Triple-A Specialty Co. (C. C. A., 7th, 1937), 88 F. (2d) 852 (at p. 854):

"The Declaratory Judgment Act merely introduced additional remedies. *It modified the law only as to procedure* and, though the right to such relief has been in some cases inherent, the statute extended greatly the situations under which such relief may be claimed. *It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued.* But the controversy is the same as previously. Heretofore the owner of the patent might sue to enjoin infringement; now the alleged infringer may sue. But the controversy between the parties as to whether a patent is valid, and whether infringement exists is in either instance essentially one arising under the patent laws of the United States. It is of no moment, in the determination of the character of the relief sought, that the suit is brought by the alleged infringer instead of by the owner." (Emphasis supplied.)

Bliss v. Cold Metal Process Co. (C. C. A., 6th, 1939), 102 F. (2d) 105 (at p. 108) (After citing *Aetna Life Insurance Company v. Haworth,* supra):

"Tested by these rules and by the application made of them to the facts in the Aetna case, there is here a justiciable controversy. The defendant asserts that the plaintiff's structures infringe patents which it owns and which it claims are valid.

The plaintiff denies infringement and has invited suit against it upon the patents without response. It denies the validity of the patents, and has so notified the defendant at least by its bill if not prior thereto. The parties stand in adversary positions in respect to legal rights and obligations. Their differences are concrete and not hypothetical or abstract. It is of no moment in the determination of the character of the relief sought that the suit is brought by the alleged infringer instead of by the owner. Edelmann & Co. v. Triple-A Specialty Co., 7 Cir., 88 F. 2d 852.

"Circumstances may contain all of the elements out of which a controversy may arise and yet there will be no controversy if one claiming a right or interest invaded by another does not choose to assert his right. Likewise may there be circumstances pointing to a possible controversy in the past, without present actuality, by reason of abandonment or change of position by adversaries. But these speculations may not be indulged in in respect to the present situation of the parties. While the defendant made public claims of infringement many years before the filing of the bill, it has now charged customers of the plaintiff with infringing its patents through the instrumentality of mills purchased from the plaintiff and has brought suits against them. *Since the filing of the bill it has brought suit for infringement against the plaintiff itself. All doubts as to the existence of a present controversy are now dispelled.*" (Emphasis supplied.)

lation of it. The plaintiffs are 'interested' parties; if the patent is valid, their business is ruined. *They seek a declaration of their right to continue their business despite the issuance of a patent to the defendants. This is a 'right' or 'legal relation' that the court has power to declare.*

"It is said that a suit by a private party who has no patent himself to declare a competitor's patent void is without precedent. The charge is true. Heretofore the actions arising under the patent laws and cognizable in the federal courts have been suits in equity to obtain a patent (35 USCA Sec. 63), suits in equity to cancel an interfering patent (section 66), actions at law for damages by infringement (section 67), suits in equity for injunction and other relief because of infringement (section 70), and suits in equity by the United States to cancel a patent for fraud (United States v. American Bell Telephone Co., 167 U. S. 224, 17 S. Ct. 809, 42 L. Ed. 144). But the Declaratory Judgment Act was passed with the purpose of affording relief in cases that could not be tried under existing forms of procedure. It is a remedial statute and should be construed and applied liberally." (Emphasis supplied.)

Ex Parte Young (1908), 209 U. S. 123 (at pp. 157-161), 52 L. Ed. 714:

"In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

"It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed * * *, but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. *The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.*

"* * * If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. * * *

"It would seem to be clear that the Attorney General, under his power existing at common law and by virtue of these various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statutes of the State, including, of course, the act in question, if it were constitutional. *His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States Circuit Court.*" (Emphasis supplied.)